# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

## No. 51.

X CASES (MORE OR LESS), EACH CONTAINI
TWELVE BOTTLES OF HUKMAN'S ALTERATIVE, HU
MAN MANUFACTURING COMPANY, OWNER, PLA
TIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES F
THE DISTRICT OF NEBRASKA.

FILED JANUARY 6, 1916.

(24,014)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1915.**

## No. 51.

SIX CASES (MORE OR LESS), EACH CONTAINING TWELVE BOTTLES OF ECKMAN'S ALTERATIVE, ECKMAN MANUFACTURING COMPANY, OWNER, PLAINTIFF IN ERROR,

*vs.*

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1915.

1 Pleas Before the Honorable Judges of the District Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the September, 1913, Term Thereof.

2 Be it remembered, that on the 12th day of December, 1912, libel was filed in the office of the Clerk of said Court, which said libel is in words and figures following, to-wit:

United States District Court, District of Nebraska, Omaha Division.

No. 106.

UNITED STATES OF AMERICA, Libellant,
vs.
SIX CASES (More or Less), Each Containing 12 Bottles *Each* of Eckman's Alterative, Drug Product, Defendant.

*Libel.*

To the Honorable Judges of the District Court of the United States for the District of Nebraska, Omaha Division:

The libel of the United States of America, by F. S. Howell, United States Attorney for the District of Nebraska, who in this case prosecutes in its behalf, respectfully represents as follows:

**First.**

This libel is filed by the United States of America, in its own right, and prays seizure for condemnation and confiscation of certain articles of drugs contained in six cases, more or less, each original case being labeled,

"Eckman's Alterative. Guaranteed by the makers to conform to all the provisions of the Food & Drugs Act—Serial No. 1242. Prepared only by Eckman Manufacturing Co., Laboratory, Philadelphia, Pa.—One doz. Eckman's Alterative."

in accordance with the Act of Congress of June 30, 1906, commonly known as The Food & Drugs Act.

3 **Second.**

Your libellant represents to the court that in the City of Omaha, County of Douglas, state of Nebraska, in the Omaha Division of the district of Nebraska, and within the jurisdiction of this Honorable Court, and in the possession of E. E. Bruce & Company, a corporation organized and existing under and by virtue of the laws of the state of Nebraska, and now located and being on the premises of the said E. E. Bruce & Company, at 10th and Harney Streets, in said City, County, Division and District aforesaid, are

certain articles of drugs, and being of the particular description following, to-wit:

Six cases (more or less) each case containing 12 bottles of a certain article of drugs, each original case being labeled as is set forth in the first paragraph of this libel. And each of the bottles contained as aforesaid, in said six cases (more or less) being labeled as follows:

"Eckman's Alterative,—contains twelve per cent. of alcohol by weight, or fourteen per cent. by volume—used as a solvent. For all throat and lung diseases including Bronchitis, Bronchial Catarrh, Asthma, Hay Fever, Coughs and Colds, and Catarrh of the Stomach and Bow*l*es, and Tuberculosis (Consumption) * * * two dollars a bottle. Prepared only by Eckman's Mfg. Co. Laboratory Philadelphia, Penna. U. S. A."

And each package containing each bottle aforesaid, then and there contained a printed circular, containing the following statements:

"Effective as a preventative for Pneumonia." "We know it has cured and that it has and will cure Tuberculosis."

**Third.**

4 Your libellant represents that the said six cases (more or less) each containing 12 bottles of drugs, are illegally held, as aforesaid, within the jurisdiction of this Honorable Court, and that said article of drugs is misbranded in violation of Section eight of the Food and Drugs Act of June 30, 1906, as amended, and is liable to condemnation and is confiscable, as provided therein, for the following reasons, namely: the statement "effective as a preventative for pneumonia" appearing on the circular enclosed, as aforesaid, in the package containing each bottle, is false, fraudulent and misleading in this, to-wit, that it conveys the impression to purchasers that said article of drugs can be used as an effective preventative for pneumonia, whereas, in truth and in fact said article of drugs could not be so used; and the statement "We know it has cured and that it has and will cure tuberculos-", appearing on the aforesaid circular, enclosed as aforesaid in each package containing said article of drugs, is false, fraudulent and misleading in this to-wit, that it conveys the impression to purchasers that said article of drugs will cure tuberculosis, or consumption, whereas, in truth and in fact said article of drugs would not cure tuberculosis, or consumption, there being no medicinal substance nor mixture of substances known at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption.

**Four.**

Your libellant further represents that all of the matters above set forth are true; that said six cases, more or less, each containing 12 bottles, of drugs, have been transported from Chicago, in the state of Illinois, to Omaha, Nebraska, and are now located and situated upon the premises of E. E. Bruce & Company, a corporation as aforesaid, in the said city of Omaha, and are now offered

for sale and to be offered for sale by said E. E. Bruce & Company, in violation of the Food & Drugs Act of June 30, 1906, aforesaid; that the aforesaid six cases, more or less, each containing 12 bottles of drugs were shipped on or about the 14th day of November, 1912, by Eckman Manufacturing Company, from their Chicago warehouse, in interstate commerce, to-wit, by way of the Chicago and Northwestern Railroad Company, and having been so transported remain now unsold and in original unbroken packages in the possession of the said E. E. Bruce & Company, at Omaha, Nebraska, and that the said article of drugs, was, as aforesaid, misbranded before and at the time of said transportation, and so remains, contrary to the form of law in such case made and provided.

Wherefore, in consideration of the premises, your libellant prays:

1. That the said article of drugs, consisting of six cases, more or less, each case containing 12 bottles, labeled as aforesaid, may be proceeded against and seized for condemnation in accordance with the said Act of Congress approved June 30, 1906, and that to this end this Honorable Court may order to issue the process of attachment in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction so far as is applicable in this case, and that said E. E. Bruce & Company, a corporation, and all other persons having or pretending to have any right, claim or interest in said article of drugs above mentioned, may be cited to appear herein and answer all and singular the premises aforesaid, and that any person claiming an interest in said articles of drugs, if they are non residents of this district, may be cited by process of publication in the manner provided by law.

2. That by an appropriate order of this Honorable Court it may adjudge and decree that said article of drugs, contained in said six cases, more or less, be condemned at the suit of this libellant, according to the provisions of said Act of Congress, approved June 30, 1906.

3. That this Honorable Court may pass all such orders, decrees and judgments as may be necessary in the premises, and may grant to your libellant a decree for the costs of this proceeding against the owners or holders of said articles condemned, should such costs not be satisfied out of the proceeds of the same.

4. That your libellant may have such other and further relief as the nature of the case may require.

F. S. HOWELL,
*United States Attorney.*

STATE OF NEBRASKA,
*County of Douglas, ss:*

I, F. S. Howell, being first duly sworn, on oath depose and say that I am United States Attorney for the district of Nebraska, that I have read the foregoing libel and the statements therein contained are true to the best of my knowledge and belief.

F. S. HOWELL.

Subscribed in my presence and sworn to before me this 12th day of December, 1912.

[SEAL.]

R. C. HOYT,
*Clerk U. S. District Court.*

Endorsed: Filed Dec. 12, 1912. R. C. Hoyt, Clerk.

7 Thereupon afterwards, At the September 1912 Term of said Court, and on the 12th day of December, 1912, order was signed and filed in said case and duly entered of record in Journal No. 1 of said Court, to-wit:

United States District Court, District of Nebraska, Omaha Division.

UNITED STATES OF AMERICA, Libellant,
v.
SIX CASES (More or Less), Each Containing 12 Bottles of Eckman's Alterative, a Drug Product, Defendant.

*Order.*

Now, on this 12th day of December, 1912, comes F. S. Howell, United States Attorney for the District of Nebraska, and having heretofore filed in said court on behalf of the United States a libel for the seizure, for condemnation and confiscation, of six cases, more or less, each containing 12 bottles of Eckman's Alterative, a certain article of drugs, now in the possession of E. E. Bruce & Company, a corporation, in the city of Omaha, in the county of Douglas, in the Omaha Division of the District of Nebraska, and now presents said libel praying that the said article of drugs may be seized for condemnation and confiscation and may be held and dealt with as this court may order and determine, and that the usual process and monition of the court in that behalf be made, and that the court, considering said libel and application and being fully advised in the premises:

Ordered, that such of said article of drugs, that is, such of the six cases, each containing 12 bottles each, as may be found in the possession of the said E. E. Bruce & Company, a corporation, within the said Omaha Division of the District of Ne-
8 braska, shall be seized by the Marshal of the District of Nebraska, and the usual attachment and monition of court be issued by the clerk of this court, to the Marshal of this District for the attachment and detention of said article of drugs, and that the Marshal of this Court make service according to law and notice particularly to said E. E. Bruce & Company, and shall publish a citation giving notice generally to all persons having or protending to have any right, title, interest or claim in said property, to appear before said Court in the city of Omaha, Nebraska, in said Division and District, on the 13th day of January, 1913, at 10 A. M., then and there to make known their claims and allegations in said matter, and that the said Marshal publish said citation for at least three weeks,

prior to said date, in The Examiner, a paper published and printed at Omaha, Nebraska, and in the Omaha Division of said District.

W. H. MUNGER, *Judge.*

Endorsed: Filed Dec. 12, 1912. R. C. Hoyt, Clerk.

9 Thereupon afterwards, to-wit: On the 12th day of December, 1912, warrant and monition was issued in said case, and returned and filed on the 15th day of January, 1913, which said warrant and monition is in words and figures following, to-wit:

United States District Court, District of Nebraska, Omaha Division.

UNITED STATES OF AMERICA, Libellant,

v.

SIX CASES (More or Less), Each Containing 12 Bottles of Eckman's Alterative, a Drug Product, Defendant.

*Warrant and Motion.*

The President of the United States of America to the Marshal of the District of Nebraska, Greeting:

You are hereby strictly enjoined and commanded to attach and arrest six cases (more or less) each containing 12 bottles of Eckman's Alterative, an article of drugs, each case being labeled.

"Eckman's Alterative. Guaranteed by the makers to conform to all the provisions of the Food & Drugs Act—Serial No. 1242. Prepared only by Eckman Manufacturing Co., Laboratory Philadelphia, Penna. One Doz. Eckman's Alterative."

And each of the bottles contained in said six cases aforesaid, being labeled in part:

"Eckman's Alterative—contains twelve per cent of alcohol by weight, or fourteen per cent by volume—used as a solvent * * * Two dollars a bottle. Prepared only by Eckman Mfg. Co., Laboratory, Philadelphia, Penna., U. S. A."

in the possession of E. E. Bruce & Company, a corporation, at 10th and Harney Streets, in the city of Omaha, Nebraska, or so much thereof as you may be able to find in your district, and the same so seized you shall keep under attachment and arrest until
10 you shall receive further order from this court, or until the same shall be discharged in due course of law, and that you cite the E. E. Bruce & Company, a corporation, in particular, and all persons in general who have or pretend to have any right, title or interest or claim therein, to appear before the judge of the district court of the United States for the district of Nebraska, Omaha Division, on the 13th day of January, 1913, at 10 A. M., then and there to make known their claims and allegations in said matter, and further to do and receive in this behalf as in justice shall pertain, and that you duly certify to the court what you shall do in the premises.

Witness the Honorable W. H. Munger, Judge of the said Court and the seal thereof, hereto affixed at Omaha, in said District, on this 12th day of December, 1912.

[SEAL.]

R. C. HOYT,
*Clerk U. S. District Court.*

Attached to said Warrant and Monition is the Return of the Marshal in words and figures following, to-wit:

***Return.***

UNITED STATES OF AMERICA,
*District of Nebraska, ss:*

I hereby certify and return that I received this Order, and Warrant and Monition, on the 12th day of December, 1912, and on the same day I served the same by seizing such of said Alterative as could be found, to-wit: Sixty Bottles of Eckman's Alterative which were in the custody and possession of E. E. Bruce & Company, at 401-405 South Tenth Street, in the city of Omaha, Douglas County, Nebraska, and at the time of such seizure I gave notice to the E. E. Bruce & Company by reading to E. E. Bruce, President of said E. E. Bruce & Company, and in charge of their store house and their said business and said goods so seized, and at the same time I posted, a copy of said writ on the said goods so seized, such
11 seizure being made in presence of B. E. Griffiths, T. Freed, C. E. Bedwell and H. B. Evans, and thereupon, by and with the advice and consent of the United States Attorney, and the said E. E. Bruce & Company, and in accordance with an agreement then and there made, I left said goods stored in the said building of the said E. E. Bruce & Company to await the further order of the Court, and took from the said company, through C. E. Bedwell, Vice President of the said E. E. Bruce & Company, a receipt therefor and an agreement in writing to hold said goods until the further order of said court, under my instructions and possession, which receipt and agreement is hereto attached and made a part of this return.

I also gave notice generally to all concerned, of such seizure by publishing the attached Citation for three weeks in The Examiner, a paper printed and published in Omaha, Nebraska, such Citation and proof of publication thereof are hereto attached and made a part of this return.

Dated this 13th day of January, 1913.

WM. P. WARNER,
*United States Marshal,*
By H. P. HAZE, *Deputy.*

The receipt and agreement referred to in the foregoing Return is in the words and figures following, to-wit:

E. E. Bruce & Co.

Wholesale Druggists and Stationers.

401-403-405 So. 10th St.

E. E. Bruce, Pres. & Treas., C. E. Bedwell, Vice-Pres., B. E. Griffiths, Secy.

OMAHA, NEB.

Received from United States Marshal William P. Warner, a total of 5 doz. (60 bots), of a product marketed and sold as Eckman's Alterative which 60 bots. of this product was seized by United States Marshal, William P. Warner, on December 12, 1912, case number 106 Civil, we are to hold the same intact upon our premises and subject to the order of the Court, the above 60 bots.
12 of Eckman's Alterative being the property of the United States of America.

E. E. BRUCE & CO., INCORPORATED,
By C. E. BEDWELL, *V. Pres.*

The Proof of Publication and Citation referred to in said Return are in the words and figures following, to-wit:

*Publisher's Affidavit.*

STATE OF NEBRASKA,
*County of Douglas, ss:*

Before me, the undersigned a notary public, this day personally came Alfred Sorenson, who being first duly sworn, according to law, says that he is the publisher of The Examiner, a weekly newspaper published at Omaha, in said county and state, and that the publication, of which the annexed is a true copy, was published in said paper on the 28th day of December, 1912, and once each week thereafter for two consecutive weeks, and that the rate charged therefor is not in excess of the commercial rates charged private individuals with the usual discounts.

ALFRED SORENSON.

Subscribed and sworn to before me this 14th day of January, 1913.

[SEAL.] STANLEY SERPAN,
*Notary Public.*

*Legal Notice.*

United States District Court, District of Nebraska, Omaha Division.

UNITED STATES OF AMERICA, Libellant,
vs.
SIX CASES (More or Less), Each Containing 12 Bottles of Eckman's Alterative, a Drug Product, Defendant.

*Citation.*

Under and pursuant to an order in due and regular process in the above entitled cause, I did, on the 12th day of December, 1912, seize the following described property, to-wit: 60 bottles of Eckman's Alterative, the same being in the possession of E. E.
13 Bruce & Company, a corporation, at Omaha, within the Omaha Division of the District of Nebraska, each of said bottles being labeled in part:

"Eckman's Alterative—contains twelve per cent of alcohol by weight or fourteen per cent by volume—used as a solvent. * * * Two dollars a bottle. Prepared only by Eckman's Mfg. Co. Laboratory Philadelphia, Penna. U. S. A."

which said 60 bottles had theretofore been shipped, in case lots of 12 bottles each, in interstate commerce, via Chicago & Northwestern Railway Company, from Chicago, Illinois, to E. E. Bruce & Company at Omaha, Nebraska, on or about the 14th day of November, 1912, and were received by said E. E. Bruce & Company at Omaha, Nebraska, on or about the 15th day of November, 1912; it being claimed that said drug product is misbranded within the meaning of the food and drugs act of June 30, 1906, as amended, and the same are now in my possession and I do hereby give notice generally and to all persons having or pretending to have any right, title, interest or claim in said property, to appear in the said court, in the city of Omaha, Nebraska, in said district and division on the 13th day of January, 1913, at 10 o'clock, in the forenoon of said day, then and there to make known their claim and allegations in the said matter.

Dated at Omaha, Nebraska, this 23d day of December, 1912.

WM. P. WARNER,
*United States Marshal for the District of Nebraska.*

Endorsed: Filed Jan. 15, 1913. R. C. Hoyt, Clerk.

14 Thereupon afterwards, to-wit: On the 13th day of October, 1913, Demurrer was filed in said case, which said Demurrer is in words and figures following, to-wit:

United States District Court, District of Nebraska, Omaha Division.

No. 106, Civil.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SIX CASES (More or Less), Each Containing 12 Bottles of Eckman's Alterative, Defendant.

Libel.

*Demurrer.*

The defendant the Eckman Manufacturing Company, says that the libel filed by the United States of America, in the above entitled cause is bad in substance in that:

1. The said libel does not state any ground in law or in fact for the seizure of the articles mentioned therein;

2. The said libel does not contain any statement of facts that gives to the United States a right to seize the articles mentioned therein;

3. The said libel on its face shows that the said alleged statements charged to be false and fraudulent were not contained on any label or package;

4. The said libel shows on its fact that the said package seized did not bear or contain any statement or design or device regarding the curative or therapeutic effect of the articles seized, or of any of the ingredients or substances contained in said article;

5. That said libel does not state any fact upon which to base the conclusion that the said statement- mentioned in the said libel are false and fraudulent.

15 6. That the said libel does not allege any fact upon which to base a statement that the statements contained within its printed circular are false and fraudulent in that they convey an impression to the purchaser that the article of drug will cure tuberculosis or consumption, as in said libel set forth, except the opinion that there is not a medical substance known at the present time which can be relied upon for the effective treatment or cure of tuberculosis;

7. The said Act of Congress approved August 23, 1912, is null, void, and of no effect, the said Congress of the United States being without the power or authority to enact the same;

8. The said Act mentioned aforesaid is unconstitutional in that it undertakes to regulate statements regarding the curative or therapeutic effect of an article which said statements are mere opinions, and that the expression of said opinions can not be regulated by an Act of Congress.

DANIEL W. BAKER,
EDWARD M. MARTIN,
*Attorneys for Defendant Eckman Manufacturing Company.*

Endorsed: Filed Oct. 13, 1913. R. C. Hoyt, Clerk.

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16 Thereupon afterwards, to-wit: On the 29th day of November, 1913, that being one of the days of the September 1913 Term of said Court, held at the Court House in the city of Omaha, before Hon. Page Morris, the following among other proceedings were had in words and figures following, to-wit:

No. 106, Civil.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SIX CASES (More or Less), Each Containing 12 Bottles of Eckman's Alterative, a Drug Product, Defendant.

This cause came on to be heard on the application of the plaintiff, in open court, for leave to amend its Libel instanter by interlineation, by inserting on the sixth line of page 3 thereof, after the semi-colon following the word "used," the following words: "as the said Eckman Manufacturing Company then and there well knew," and on the seventeenth line of the same page following the word "consumption," the words: "All of which the said Eckman Manufacturing Company then and there well knew" and the court being fully advised concerning the same it is Ordered, that said amendments be and the same are hereby disallowed and said application overruled, to which the plaintiff excepts.

This cause came on further to be heard on the demurrer filed by the Eckman Manufacturing Company to the Libel of the plaintiff herein and was argued by counsel and the court being fully advised in the premises it is

Ordered, that said demurrer be and the same is hereby overruled to which order the Eckman Manufacturing Company excepts.

17 Thereupon afterwards, to-wit: On the 8th day of December, 1913, Election of Defendant to Stand on Demurrer was filed in said case, which said Election is in words and figures following, to-wit:

United States District Court, District of Nebraska, Omaha Division.

Civil, No. 106.

UNITED STATES OF AMERICA, Libelant,
vs.
SIX CASES (More or Less), Each Containing 12 Bottles of Eckman's Alterative, a Drug Product, Defendant.

Libel.

*Election of Defendant to Stand on Demurrer.*

Now comes the defendant, Eckman Manufacturing Company, by their attorneys, and excepts to the ruling of the court in over-

ruling the demurrer filed by the said defendant to the libel in the above entitled cause, and elects to stand on the demurrer filed herein.

DANIEL W. BAKER,
EDWARD M. MARTIN,
*Attorneys for Defendant.*

Endorsed: Filed Dec. 8, 1913. R. C. Hoyt, Clerk.

18 Thereupon afterwards, to-wit: At the September 1913 Term of said Court, and on the 8th day of December, 1913, Judgment of Condemnation was signed in said case, and filed on the 10th day of December, 1913, and duly entered of record in Journal No. 2 of said Court, to-wit:

United States District Court, District of Nebraska, Omaha Division.

No. 106, Civil.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SIX CASES (More or Less), Each Containing 12 Bottles of Eckman's Alterative, a Drug Product, Defendant.

**Libel.**

*Judgment of Condemnation.*

This cause coming on to be heard on the libel filed in the above entitled cause, the demurrer thereto, the order of the court overruling the demurrer and the exception of the defendant to such order, and the election of the defendant to stand on said demurrer, and upon motion of the United States for judgment in said cause; and it appearing to the court that the court has overruled the demurrer filed by the said defendant, and the said defendant having elected to stand on said demurrer, and by such election said cause can not be further proceeded with except to judgment, and said demurrer admitting the facts in said libel as pleaded, and that by reason of the alleged facts in said libel set forth, the said articles mentioned therein so seized, are liable to condemnation and confisca-
19 tion as provided in said Act of Congress; it is by the Court, this 8th day of December, 1913,

Ordered, Adjudged and Decreed that the said six cases more or less, each original case being labeled as follows:

"Eckman's Alterative. Guaranteed by the makers to conform to all the provisions of the Food and Drugs Act—Serial No. 1242. Prepared only by Eckman Manufacturing Co., Laboratory, Philadelphia, Pa.—One Doz. Eckman's Alterative."

are misbranded within the meaning of the said Act approved June 30, 1906, as amended by the Act of August 23, 1912.

And it is further ordered that each and every one thereof be, and

the same are hereby condemned, and shall be disposed of by destruction by the said Marshal of this District under such terms and conditions as will not violate the provisions of said Act;

Provided, however, that the said defendant, Eckman Manufacturing Company, may within sixty days from this judgment, or thirty days from any judgment affirming this judgment, pay the costs of this proceeding and redeem said goods by giving bond in the penal sum of two hundred and fifty dollars ($250.) conditioned that the said goods so seized and condemned shall not be sold or otherwise disposed of contrary to the provisions of this Act.

It is further ordered, that the said defendant, Eckman Manufacturing Company, pay the costs of this proceeding.

By the Court.

PAGE MORRIS, *Judge.*

O. K.
HOWELL.

Endorsed: Filed Dec. 10, 1913. R. C. Hoyt, Clerk.

20 Thereupon afterwards, to-wit: On the 15th day of December, 1913, Assignment of Errors was filed in said case, which said Assignment of Errors is in words and figures following, to-wit:

United States District Court, District of Nebraska, Omaha Division.

Civil. No. 106.

UNITED STATES OF AMERICA, Plaintiff.
vs.
SIX CASES (More or Less), Each Containing Twelve Bottles of Eckman's Alterative, Defendant.
and
THE ECKMAN MANUFACTURING CO., Owner, Defendant.

*Assignment of Errors.*

Now comes the Eckman Manufacturing Company, defendant in the above entitled cause, made so by order of Court, and respectfully represents that it feels itself aggrieved by the proceedings and judgment of the United States District Court, District of Nebraska, Division of Omaha, in the above entitled cause (and without prejudice) assigns error as follows:

1. That the Court erred in not holding the said Act of Congress of June 30, 1906, as amended by the Act of Congress of August 23, 1912, unconstitutional, null and void, and without the power of Congress to enact the same.

2. That the Court erred in holding the said Act of Congress aforesaid amended as — unconstitutional in that it undertakes (if the construction is given as claimed for the United States and

held by the Court) to regulate statements which are within
21 a package and that do not become known to the purchaser until the said package has been purchased by the purchaser and entered into domestic commerce.

3. That said Act mentioned as aforesaid and amended as aforesaid is unconstitutional in that it undertakes to regulate statements regarding the curative and therapeutic effect of the articles, which said statements are mere opinions, and the expressions of said opinions cannot be regulated by an Act of Congress.

4. That said Act is unconstitutional as amended in that it does not come within the power of Congress, under the provisions of the Constitution "to regulate commerce with foreign nations and among the several states."

5. That said Act as aforesaid as amended aforesaid is unconstitutional in that it is violative of the Fifth Amendment, which is as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces; or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

in that it attempts to deprieve the defendant of his property
22 without due process of law.

6. That said Act of Congress as amended is unconstitutional in that it is violative of the Sixth Amendment of the Constitution which is as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense."

because it attempts to punish one for making statements regarding the curative and therapeutic effect of an article, which said statements are mere opinions.

7. That the said Act as amended is unconstitutional and in violation of the Sixth Amendment because by reason of the subject matter thereof, the said defendant is not informed of the nature and cause of the action against it by said Act as amended as aforesaid.

8. That said libel does not state any ground in law or in fact for the seizure of the articles mentioned aforesaid.

9. That said libel does not contain any statement of facts that gives to the United States a right to seize the articles mentioned therein.

10. That said libel on its face shows that the said alleged
23 statements charged to be false and frudulent were not contained on any label or package.

11. That said libel shows on its face that the said package seized did not bear or contain any statement or design or device regarding the curative or therapeutic effect of the articles seized or of any of the ingredients or substances contained in said article.

12. That the said libel does not state any fact upon which to base the conclusion that the said statements contained in the said libel are false and fraudulent.

13. That the said libel does not allege any fact upon which to base a statement that the statements contained within the printed circular are false and fraudulent in that they convey an impression to the purchaser that the article of drug will cure tuberculosis or consumption, as in said libel set forth, except the opinion that there is not a medical substance known at the present time which can be relied upon for the effective treatment or cure of tuberculosis.

Wherefore on account of said manifest errors and each of them the said defendant the Eckman Manufacturing Company prays that the said judgment of the said District Court of the United States may be reviewed by the Supreme Court of the United States, and that the said District Court be reversed, and said demurrer filed in the said District Court be sustained; and said libel be dismissed and the goods seized under said libel be returned to the said defendant, the Eckman Manufacturing Company.

DANIEL W. BAKER,
FRANCIS D. WEAVER,
EDWARD M. MARTIN,
*Attorneys for Eckman Manufacturing Company, Defendant and Plaintiff in Error.*

Endorsed: Filed Dec. 15, 1913. R. C. Hoyt, Clerk.

24 Thereupon afterwards, to-wit: On the 15th day of December, 1913, Petition for Writ of Error was filed in said case, which said Petition is in the words and figures following, to-wit:

United States District Court, District of Nebraska, Omaha Division.

Civil, No. 106.

UNITED STATES OF AMERICA, Plaintiff,
vs.
SIX CASES (More or Less), Each Containing Twelve Bottles of Eckman's Alterative, Defendant,
and
ECKMAN MANFACTURING CO., Owner, Defendant.

*Petition for Writ of Error.*

To the Honorable Judge Morris, Holding United States Court, District of Nebraska, Omaha Division:

Now comes the Eckman Manufacturing Company, defendant in the above entitled cause and owner of the goods mentioned in the libel seized in the above entitled cause, and says that on the 10th day of December, 1913, this court entered judgment therein in favor of the United States, by which said judgment the goods seized in the above entitled cause were condemned and costs awarded against this defendant and defendant says that the said judgment of this court and the proceedings had prior thereto contained certain errors which were committed by the court to the prejudice of this defendant, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore, the said defendant, the Eckman Manufacturing Company, prays that a writ of error may issue in this behalf from the Supreme Court of the United States for a correction of the
25 errors so complained of, said errors being such that defendant is entitled to a writ from this court directly to the Supreme Court of the United States; that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States; that the penalty of the bond may be fixed by this Court; that citation may be granted and that such judgment may be reviewed and reversed.

DANIEL W. BAKER,
FRANCIS D. WEAVER,
EDWARD M. MARTIN,
*Attorneys for Defendant,*
*Eckman Manufacturing Company.*

Endorsed: Filed Dec. 15, 1913. R. C. Hoyt, Clerk.

26 Thereupon afterwards, to-wit: On the 15th day of December, 1913, a Writ of Error was allowed in said case, and a Citation duly signed, and returned and filed on the 15th day of December, 1913, with acceptance of service endorsed thereon, the following of which are the originals:

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States District Court for the District of Nebraska, Omaha Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court for Nebraska, aforesaid before you, or some of you, between The United States of America versus Six Cases (more or less), each containing Twelve Bottles of Eckman's Alterative, and the Eckman Manufacturing Company, a corporation, owner and defendant, a manifest error hath happened, to the great damage of the said Six Cases (more or less), each containing Twelve Bottles of Eckman's Alterative and the said defendant, Eckman Manufacturing Company, a corporation, owner and defendant, (Civil Case numbered 106) as by its complaint appears. We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 15th day of December, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, District of Nebraska, Omaha Division.]

R. C. HOYT,
*Clerk of the United States District Court*
*for the District of Nebraska, Omaha Division.*

Allowed by
PAGE MORRIS,
*Judge of the District Court of the United States*
*for the District of Nebraska, Omaha Division.*

[Endorsed:] 106 Civil. Writ of error. Filed at — M. Dec. 15, 1913. R. C. Hoyt, clerk.

*Return to Writ.*

UNITED STATES OF AMERICA,
*District of Nebraska, Omaha Division, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified tran-

script of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said District Court at my office in the city of Omaha this 3rd day of January, A. D. 1914.

[Seal United States District Court, District of Nebraska, Omaha Division.]

R. C. HOYT,
*Clerk of said Court.*

28 Original, 106.

UNITED STATES OF AMERICA, *ss:*

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States District Court of Nebraska, Omaha Division, in Civil Case numbered 106, wherein The United States of America is plaintiff and Six Cases (more or less), each containing twelve Bottles of Eckman's Alterative, is defendant and the Eckman Manufacturing Company is owner and defendant and plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Page Morris, Associate District Judge of the United States District Court of Nebraska, Omaha Division, this 15th day of December, in the year of our Lord one thousand nine hundred and thirteen.

PAGE MORRIS,
*Judge of the District Court of the United States for the District of Nebraska, Omaha Division.*

[Endorsed:] 106, Civil. Filed at — M. Dec. 15, 1913. R. C. Hoyt, clerk.

Service of the within Citation is hereby accepted this 15th day of December, A. D. 1913.

UNITED STATES OF AMERICA,
*Plaintiff,*
By F. S. HOWELL,
*United States Attorney for the District of Nebraska.*

29 Thereupon afterwards, to-wit: On the 15th day of December, 1913, Bond was filed in said case, which said Bond is in words and figures following, to-wit:

Know All Men By These Presents: That we, The Eckman Manufacturing Company, a corporation, and owner and defendant, as principal, and Southwestern Surety Insurance Company, as sureties, are held and firmly bound unto The United States of America, in the full and just sum of two hundred and fifty (250) dollars, to be paid to the said United States of America, or their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this eleventh day of December, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the United States District Court for the District of Nebraska, Omaha Division, in a suit depending in said Court, between The United States of America versus Six cases (more or less) each containing twelve bottles of Eckman's Alterative, and the Eckman Manufacturing Company, owner and defendant (Civil case numbered 106), a judgment was rendered against the said Six cases (more or less) each containing twelve bottles of Eckman's Alterative, and the Eckman Manufacturing Company, owner and defendant, and the said Eckman Manufacturing Company, a corporation, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing them to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Eckman Manufacturing Company, owner and defend-
30 ant, shall prosecute its judgment to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and effect.

ECKMAN MFG. COMPANY,
By THOS. T. ECKMAN, *Pres.* [SEAL.]

Attest: F. D. WEAVER, *Sec'y,* [SEAL.]

SOUTHWESTERN SURETY INSURANCE COMPANY, [SEAL.]
By E. H. LUIKART, *Attorney in Fact.*

Sealed and delivered in presence of
F. D. WEAVER,
*For Eckman M'f'g Co.*
WM. B. HUGHES,
*For S. W. Surety Ins. Co.*

[Seal Eckman Mfg. Co.]
[Seal Southwestern Surety Ins. Co.]

Approved by
PAGE MORRIS, *Judge.*

Endorsed: Filed Dec. 15, 1913. R. C. Hoyt, Clerk.

31 Thereupon afterwards, to-wit: On the 24th day of December, 1913, Præcipe for Transcript was filed in said case which said Præcipe is in the words and figures following, to-wit:

32 & 33 United States District Court, District of Nebraska, Omaha Division.

No. 105, Civil.

UNITED STATES OF AMERICA
vs.
SEVEN CASES (More or Less), Each Containing Twelve Bottles of Eckman's Alterative.

*Precipe for Transcript.*

To the Clerk of said Court:

Please prepare Transcript on writ of error to the Supreme Court of the United States, same to consist of the following:

1. Libel filed December 12, 1912,
2. Order of Seizure and to show cause entered December 12, 1912,
3. Warrant and Monition with Return of U. S. Marshal, and Proof of Publication, filed January 15, 1913;
4. Demurrer of Eckman Manufacturing Co. filed Oct. 13, 1913;
5. Order overruling Application of plaintiff for leave to amend Libel and overruling Demurrer, entered Nov. 29, 1913;
6. Election of Eckman Manufacturing Co. to stand on Demurrer, filed December 8, 1913;
7. Judgment of condemnation, entered December 10, 1913,
8. Assignment of Errors; Petition for Writ of Error; Writ of Error; Bond; Citation, and Clerk's certificate to Transcript.

ECKMAN MANUFACTURING COMPANY,
By DANIEL W. BAKER,
EDWARD M. MARTIN,
*Its Attorneys.*

Endorsed: Filed Dec. 24, 1913. R. C. Hoyt, Clerk.

34 UNITED STATES OF AMERICA,
*District of Nebraska, ss:*

I, R. C. Hoyt, Clerk of the District Court of the United States, for the District of Nebraska, hereby certify that pursuant to the foregoing Writ of Error, and in obedience thereto, and in compliance with the Præcipe, a copy of which is found on page 32 hereof, the foregoing record has been made and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court, as mentioned in said Præcipe and as indicated in the foregoing Index, in the case of the United States of America,

Plaintiff vs. Six cases (more or less) each containing 12 bottles of Eckman's Alterative, a drug product, Defendant, Case No. 106, Civil Docket, and that copies of the Writ of Error and Citation, duly certified have been lodged and remain in my said office as such Clerk.

Witness my hand and the Seal of said Court, at Omaha, in said District, this 2 day of January, A. D. 1914.

[Seal United States District Court, District of Nebraska, Omaha Division.]

R. C. HOYT, *Clerk.*

Endorsed on cover: File No. 24,014. Nebraska, D. C. U. S. Term No. 51. Six Cases (More or Less), Each Containing Twelve Bottles of Eckman's Alterative, Ekman Manufacturing Company, Owner, plaintiff in error, vs. The United States of America. Filed January 9, 1914. File No. 24,014.

## INDEX.



## CASE INDEX.

*Supreme Court of the United States.*

IN THE

# Supreme Court of the United States

OCTOBER TERM 1915.

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| | |
|---|---|
| Seven cases (more or less) each containing twelve bottles of Eckman's Alterative, Eckman Manufacturing Company, owner, Plaintiff in error, *vs.* UNITED STATES. | No. 50. |

AND

| | |
|---|---|
| Six cases (more or less) each containing twelve bottles of Eckman's Alterative, Eckman Manufacturing Company, owner, Plaintiff in error, *vs.* UNITED STATES. | No. 51. |

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## BRIEF FOR PLAINTIFF IN ERROR.

These cases come here before the court on writs of error to the United States District Court, District of Nebraska, Omaha Division, and both involve the same questions of libel, demurrer and judgment. The cases originated

in the District Court on two libels filed on behalf of the United States of America, praying the seizure and condemnation, under the Food and Drug Act of June 30, 1906, as *amended by the Act of Congress of August 8, 1912,* of certain articles of drugs, contained in the one instance in 7 cases (No. 50), and in the other instances in 6 cases (No. 51).

The libels recite that they are filed by the United States of America, in its own right, and pray the seizure, for condemnation and confiscation, of certain articles of drugs, in the one instance (No. 50) seven cases, and in the other (No. 51) six cases, more or less, each original case being labeled as follows:

> "Eckman's Alterative. Guaranteed by the makers to conform to all the provisions of the Food and Drugs Act—Serial No. 1242. Prepared only by Eckman Manufacturing Co. Laboratory, Philadelphia, Pa.—One Doz. Eckman's Alterative."

The aparent reason for the two libels is that the seizures were made at different places, the seven cases being seized at Richardson's Drug Store Co., and the six at the store of E. E. Bruce & Company, both being corporations engaged in the drug business in the City of Omaha, State of Nebraska. The libels then allege that in each of the said cases there were contained twelve bottles labeled as follows:

> "Eckman's Alterative—contains twelve per cent of alcohol by weight, or fourteen per cent by volume—used as a solvent. For all throat and lung diseases including Bronchitis, Bronchial Catarrh, Asthma, Hay Fever, Coughs and Colds, and Catarrh of the Stomach and Bowels, and Tuberculosis (Consumption) * * * two dollars a bottle. Prepared only by Eckman M'f'g. Co. Laboratory, Philadelphia, Penna., U. S. A."

The libels further allege that inclosed in each package containing said bottles was a circular upon which appeared the following statement or statements:

"Effective as a preventative for Pneumonia."

"We know it has cured and that it has and will cure Tuberculosis."

The libels then allege that the said cases, each containing twelve bottles of drug, are illegally held, as aforesaid, within the jurisdiction of this Honorable Court, and that said articles of drug are misbranded, in violation of Section 8 of the Food and Drugs Act of June 30, 1906, *as amended*, and are liable to condemnation and confiscation for the following reasons:

"The statement 'effective as a preventative for pneumonia' appearing on the circular enclosed as aforesaid in the package containing each bottle, is false, fraudulent and misleading in this, to-wit, that it conveys the impression to purchasers that said articles of drug can be used as an effective preventative for pneumonia, whereas, in truth and in fact said article of drug could not be so used; and the statement, 'We know it has cured and that it has and will cure tuberculosis,' appearing on the aforesaid circular, enclosed as aforesaid in each package containing said articles of drug, is false, fraudulent, and misleading in this, to-wit, that it conveys the impression to purchasers that said article of drug will cure tuberculosis, or consumption, whereas in truth and in fact said article of drug would not cure tuberculosis, or consumption, there being no medical substance nor mixture known at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption."

The libels then allege that the aforesaid packages were shipped in interstate commerce from the city of Chicago in the State of Illinois, to the City of Omaha in the State

of Nebraska, and having been transported, remain now unsold and in original unbroken packages in the possession of the said Richardson Drug Company, at Omaha, Nebraska, and that the said articles of drug were, as aforesaid, misbranded before and at the times of said transportation, and so remain, contrary to the form of law in such case made and provided.

To these libels demurrers were interposed, the grounds of the demurrers being as follows:

(1) The said libel does not state any ground in law or in fact for the seizure of the articles mentioned therein.

(2) That said libel does not contain any statement of facts that gives to the United States a right to seize the articles mentioned therein.

(3) That said libel on its face shows that the said alleged statements charged to be false and fraudulent were not contained on any label or package.

(4) The said libel shows on its face that the said package seized did not bear or contain any statement or design or device regarding the curative or therapeutic effect of the articles seized or of any of the ingredients or substances contained in said article.

(5) That said libel does not state any fact upon which to base the conclusion that the said statements contained in the said libel are false and fraudulent.

(6) That the said libel does not allege any fact upon which to base a statement that the statements contained within the printed circular are false and fraudulent in that they convey an impression to the purchaser that the article of drug will cure tuberculosis or consumption, as in said libel set forth, except the opinion that there is not a medical substance known at the present time which can be relied upon for the effective treatment or cure of tuberculosis.

(7) The said Act of Congress approved August 23, 1912, is null, void, and of no effect, the said Congress of the United States being without the power or authority to enact the same.

(8) The said Act, mentioned aforesaid, is unconstitutional in that it undertakes to regulate statements regarding the curative or therapeutic effect of an article, which said statements are mere opinions, the expression of which can not be regulated by an act of Congress.

At the time of the hearing, application was made by the United States to amend the libels (Record, pages 9 and 10), but the court disallowed the said amendments and overruled the application. The court then heard the demurrers filed by the plaintiff in error, and overruled the demurrer to each libel, to which order in each case the plaintiff in error, elected to stand on the demurrer (Record, excepted. These proceedings were had on the 29th day of November, 1913.

On the 8th day of December, 1913, the defendant, the plaintiff in error, elected to stand on the demurrer (Record, page 10), the said election being stated in the following terms:

> "Now comes the defendant, Eckman Manufacturing Company, by their attorneys, and excepts to the ruling of the court in overruling the demurrer filed by the said defendant to the libel in the above entitled cause, and elects to stand on the demurrer filed herein."

Plaintiff having so elected, final judgment was entered (Record, page 11), on the 10th day of December, 1913, the said judgment holding that the said goods "are misbranded within the meaning of the said Act approved June 30, 1906, as amended by the Act of Congress of August 23, 1912." And the court further ordered the condemnation of

the goods, and that the same should be destroyed unless a bond, as permitted by the statute, be given.

On the 15th day of December, 1913, the plaintiff in error in each case filed the following assignment of errors:

> "Now comes the Eckman Manufacturing Company, defendant in the above entitled cause, made so by order of court, and respectfully represents that it feels itself aggrieved by the proceedings and judgment of the United States District Court, District of Nebraska, Division of Omaha, in the above entitled cause (and without prejudice) assigns errors as follows:
>
> "1. That the court erred in not holding the said Act of Congress of June 30, 1906, as amended by the Act of Congress of August 23, 1912, unconstitutional, null and void, and without the power of Congress to enact the same.
>
> "2. That the court erred in not holding the said Act of Congress aforesaid, amended as aforesaid, unconstitutional in that it undertakes (if the construction is given as claimed for by the United States and held by the Court) to regulate statements which are within a package and that do not become known to the purchaser until the said package has been purchased by the purchaser and entered into domestic commerce.
>
> "3. That said Act mentioned as aforesaid and amended as aforesaid, is unconstitutional in that it undertakes to regulate statements regarding the curative and therapeutic effect of the articles, which said statements are mere opinions, and the expressions of said opinions can not be regulated by an Act of Congress.
>
> "4. That said Act is unconstitutional, as amended, in that it does not come within the power of Congress, under the provisions of the Constitution, 'to regulate commerce with foreign nations and among the several States.'
>
> "5. That said Act as aforesaid, as amended aforesaid, is unconstitutional in that it is violative of the Fifth Amendment, which is as follows:

> 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces; or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation'

in that it attempts to deprive the defendant of his property without due process of law.

"6 That said Act of Congress, as amended, is unconstitutional in that it is violative of the Sixth Amendment of the Constitution, which is as follows:

> 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.'

because it attempts to punish one for making statements regarding the curative and therapeutic effect of an article, which said statements are mere opinions.

"7. That the said Act, as amended, is unconstitutional and in violation of the Sixth Amendment, because by reason of the subject matter thereof, the said defendant is not informed of the nature and cause of the action against it by said Act, as amended, as aforesaid.

"8. That said libel does not state any ground, in law or in fact, for the seizure of the articles mentioned aforesaid.

"9. That said libel does not contain any statement of facts that gives to the United States a right to seize the articles mentioned therein.

"10. That said libel on its face shows that the said alleged statements charged to be false and fraudulent were not contained on any label or package.

"11. That said libel shows on its face that the said package seized did not bear or contain any statement or design or device regarding the curative or therapeutic effect of the articles seized or of any of the ingredients or substances contained in said article.

"12. That said libel does not state any fact upon which to base the conclusion that the said statements contained in the said libel are false and fraudulent.

"13. That the said libel does not allege any fact upon which to base a statement that the statements contained within the printed circular are false and fraudulent in that they convey an impression to the purchaser that the article of drug will cure tuberculosis or consumption, as in said libel set forth, except the opinion that there is not a medical substance known at the present time which can be relied upon for the effective treatment or cure of tuberculosis."

In the latter part of the assignment of errors, and by separate petition (Record, pages 14 and 15), two writs of error are prayed to this court, one in each case, and allowed on the 15th day of December, 1913, and the cases now come here for hearing on such writs.

## Specification of Errors.

1st. The court erred in not holding that the said Act of Congress of June 30, 1906, as amended by the Act of Congress of August 23, 1912, is unconstitutional, null and void, and that it was without the power of Congress to enact the same.

2nd. The court erred in not holding the said act, as amended, unconstitutional in that it undertakes to regulate

statements which are within a package and do not become known to the purchaser until said package has been purchased by him and entered into domestic commerce.

3d. The court erred in not holding the said act unconstitutional, as amended, in that it undertakes to regulate statements regarding the curative and therapeutic effect of the articles, which said statements are mere opinions, and expressions of opinion can not be regulated by an Act of Congress.

4th. The court erred in not holding the said Act unconstitutional, as amended, in that it does not come within the power of Congress, under the provisions of the Constitution, "to regulate commerce with foreign nations and among the several States."

5th. The court erred in not holding the said Act, as amended, unconstitutional in that it is violative of the 5th Amendment, because it attempts to deprive the defendant of his property without due process of law.

6th. The court erred in not holding the said Act of Congress, as amended, unconstitutional, in that it is violative of the Sixth Amendment of the Federal Constitution, because it attempts to punish one for making statements regarding the curative and therapeutic effect of an article, which said statements are mere opinions.

7th. The court erred in not holding said Act, as amended, unconstitutional and in violation of the Sixth Amendment, because, by reason of the subject-matter thereof, the said defendant is not informed of the nature and cause of action against it.

8th. The court erred in not holding that the said libels do not state any grounds in law or in fact for the seizure of the articles mentioned therein.

9th. The court erred in not holding that the said libels do not contain any statement of facts that gives to the United States a right to seize the articles mentioned therein.

10th. The court erred in not holding that the said libels on their face show that the said alleged statements charged to be false were not contained on any label or package.

11th. The court erred in not holding that said libels show on their face that the said packages seized did not bear or contain any statement or design or device regarding the curative and therapeutic effect of the article seized, or of any ingredient or substances contained in said articles.

12th. The court erred in not holding that the said libels do not state any facts which go to show that the statements contained in the said labels are false and *fraudulent*.

13th. The court erred in not holding that the said libels failed to allege any facts upon which to base a statement that the statements contained within the printed circular are false and *fraudulent*, in that they convey an impression to the purchaser that the said article of drug will cure tuberculosis or consumption, as in said label set forth, except the opinion that there is not a medical substance known at the present time which can be relied upon for the effective treatment or cure of tuberculosis.

## ARGUMENT.

In considering the foregoing specifications of error, we will consider *first, those that involve the constitutionality of the act, as amended*. We will then take up and consider the other objections to the libel. Before we take up and consider the first proposition that is, as to the constitutionality of the act, it is necessary to consider the nature of the statute and how the same should be construed.

## First.

### The Statute is a Penal Statute.

It might be suggested to the court that the United States, in filing the libels, apparently did not consider that the amendment known as the Sherley amendment in any way changed the law, except to add new grounds for seizure, and the libels used the words false and misleading, as in the original act, and ignored entirely the words *false and fraudulent*, as contained in the amendment.

Section one of the Food and Drugs Act of June 30, 1906, provides:

> "That it shall be unlawful for any person to manufacture within any territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court."

Section 2 of the Act provides:

> "That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drug which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the Dis-

trict of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such articles so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court; Provided, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act."

Section 8 provides:

"That the term 'misbranded,' as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug

product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

"That for the purposes of this Act an article shall also be deemed to be misbranded. In case of drugs:

"First. If it be an imitation of or offered for sale under the name of another article.

"Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocain, heroin, alpha or beta eucaine, chloroform, canabis indica, chloral hydrate or acetanilide or any derivative or preparation of any such substances contained therein."

Section 8 has been amended by the Act of Congress of August 23, 1912, (Sherley Act) which follows the last paragraph just cited and reads as follows:

"Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

The seizure in this case was made under section 10 which provides:

"That any article of food, drug or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported * * * or if it be sold or offered for sale in the District of Columbia * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded * * *

> within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction; provided, however, that upon the payment of the costs of such libel proceedings, the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act * * * the court may by order direct that such articles be delivered to the owner thereof."

In other words, while the proceeding is under section 10, the charge of misbranding is under paragraph 3, of section 8, (the amendment) which we will repeat:

> "Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

But in no proceeding could the seizure made in this case here been had except for the addition to section 8 by the amendment.

In looking at this statute and at the authorities, there is no question but that it is a penal statute.

Section 1 of the Act provides that it shall be unlawful for any person to manufacture, within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars, or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the

discretion of the court, and a heavier penalty is imposed for a second offense.

Section 2 punishes by fine for the first offense, and by fine and imprisonment, or both, in the discretion of the court, for the second offense, any one who shall sell or offer for sale in the District of Columbia any such adulterated or misbranded foods or drugs, referring to any article of food or drug adulterated or misbranded "within the meaning of this Act."

Section 10 provides for the seizure of any article of food or liquor that is "adulterated or misbranded within the meaning of this Act"; and provides for its destruction. That a proceeding under Section 10 is a criminal proceeding has been established by the authorities that had this section under consideration. The construction of this Act was before the Supreme Court of the United States in the case of Hipolite Egg Company, Claimant, vs. United States, decided March 13, 1911, and reported in 220 U. S., 45-60. In that case the court say:

> "The statute declares that it is one 'for preventing * * * the transportation of adulterated * * * foods * * * and for regulating traffic therein; and, as we have seen, section 2 makes the shipper of them criminal and section 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In other words, transportation in interstate commerce is forbidden to them, and, in a sense, they are made culpable as well as their shipper."

Again they say:

> "We are dealing, it must be remembered, with illicit articles, articles which the law seeks to keep out of commerce, because they are debased by adulteration,

and which punishes them (if we may so express ourselves) and the shipper of them."

In the case of United States vs. O. H. Johnson, decided March 30, 1910, by the District Court of the United States for the Western District of Missouri, Phillips, District judge, in quashing an indictment under Section 1 of the Food and Drugs Act, said (177 Federal Reporter, 313):

> "As this is a criminal statute creating a new offense, it must be strictly construed and applied. It must be constrained to its express reasonable intendment, otherwise the court by mere construction may extend its operation far beyond the legislative intent."

In considering what is a penal statute, this Court, in Huntington vs. Attrill, 146 U. S., 667, 668 and 669, say:

> "Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
>
> "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts of species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community,

considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors.' 3 Bl. Com., 2."

Again, in Choutau vs. United States, 102 U. S., 603, the court says:

"Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

In Lagley vs. Bye, 42 Ind. App., 592, the court says:

"A penal statute is one which inflicts the forfeiture for transgressing its provisions. It involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by civil or criminal procedure.'

In Diversey vs. Smith, 103 Ill., 390, the court says:

"Sedgwick says 'penal statutes are acts by which a forfeiture is imposed for transgressing the provisions of the act.' And moreover adds 'A penal law may also be remedial; and the statute may be remedial in one particular, and penal in another.' (Statute and Const. Law, 41.) In Potter's Dwarris on Statutes, p. 74, it is said: 'A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited.' It is the effect and not the form of the statute which is to be considered; and when its object is clearly to inflict a punishment on the party for violating it, *i. e.*—doing what is prohibited, or failing to do what is commanded to be done —it is penal in its character—and the circumstances

> that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute is unimportant.'

The proceeding in the Hipolite Egg Company case in this Court was a proceeding under Section 10; and this court, in declaring that the section punished the goods, followed its own decisions holding that a proceeding *in rem* to establish a forfeiture is a criminal proceeding.

The leading case on this question is Boyd vs. United States, 116 U. S., 616, which holds that proceedings in seizures and forfeitures are so far criminal as to come within the meaning of the Fourth Amendment to the Federal Constitution. At page 634, Mr. Justice Bradley said:

> "As, therefore, suits for penalties and forfeitures, incurred by the commision of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment."

In the case of Coffey vs. United States, 116 U. S., 436, this Court held that where for the same act there were instituted (1) a proceeding *in rem* for forfeitures for violations of the internal revenue laws, and (2) a criminal prosecution for violation of the internal revenue laws,

both are of the same nature, and that a judgment of acquittal in the criminal prosecution for a violation of the internal revenue laws is conclusive in favor of the defendant in the proceeding *in rem*.

And in the case of Lees vs. United States, 150 U. S., 476, a suit brought to recover a penalty imposed for a violation of the Act of February 26, 1885—to prohibit the importation and migration of foreigners and aliens, under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia—was held to be a criminal proceeding. The court said:

> "This, though an action civil in form, is unquestionably criminal in its nature and in such a case a defendant can not be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of Boyd vs. United States, 116 U. S., 616. The question was fully and elaborately considered by Mr. Justice Bradley in the opinion delivered in that case."

Again, in the case of Hepner vs. United States, 213 U. S., 111, the Court said:

> "In the latter case (Boyd vs. United States) it was adjudged that penalties and forfeitures incurred by the commission of offenses against the law are of such quasi criminal nature that they come within the reason of criminal proceedings for the purposes of the Fourth Amendment of the Constitution and of that part of the Fifth Amendment declaring that no person shall be compelled in any criminal case to be a witness against himself."

From these authorities it conclusively appears that this Act is a penal statute. It punishes not only the person, but under Section 10 makes the articles culpable and punishes

them by condemnation, or, if the court thinks necessary, by a destruction of the articles themselves.

This statute being a penal statute, and being necessary to bear that in mind when we are considering the question of its constitutionality, we will briefly refer to a few authorities on the question of the construction at the present time put upon statutes that are penal.

In the case of United States vs. Harris, 177 U. S., 305, a suit was brought by the United States against Harris and others, receivers of the Philadelphia & Reading Railroad Company, to recover a penalty in the sum of $500 for an alleged violation of certain sections of the Revised Statutes. The sections provided for the punishment of a railroad company for cruelty to animals while in transit. The contention was that the words, "any company," in the statute referred to receivers of a railroad company. This Court held that receivers, not being mentioned in the statute, were not liable, and in arriving at that conclusion, they said:

> "We cannot better close this discussion than by quoting the language of Chief Justice Marshall, in the case of United States vs. Wiltberger, 5 Wheat., 76:
>
> " 'The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new, independent rule which subverts the old. It is a modification of the ancient maxim and amounts to this, that though penal statutes are to be construed strictly, they are not to

be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be applied so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases."

In United States vs. Lacher, 134 U. S., 629, this court, in quoting from Sedgwick, say:

"'The rule that statutes of this class (referring to penal acts) are to be construed strictly is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction or equitable interpre-

tation, to exonerate parties plainly within their scope.'

"'This passage is quoted by Baron Bramwell in Attorney vs. Sillem, 2 H. & C., 532, as one in which good sense, force and propriety of language are equally conspicuous; and which is amply borne out by the authorities, English and American, which he cites.' Foley vs. Fletcher, 28 L. J. (N. S.) Ex. 100, 106; Nicholson vs. Fields, 31 L. J. (N. S.) Ex. 233; Hardcastle on Statutory Law, p. 25[1]."

In the case of Northern Securit[illegible] Company vs. United States, 193 U. S., 358, this court say:

"As early as the case of King vs. Inhabitants of Hodnett, 1 T. R., 96, Mr. Justice Buller said: 'It is not true that the courts in the exposition of penal statutes are to narrow the construction.' In United States vs. Wiltberger, 5 Wheat., 76, 95, Chief Justice Marshall, delivering the judgment of this court and referring to the rule that penal statutes are to be construed strictly, said: 'It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.' In United States vs. Morris, 14 Pet. 464, 475, this court, speaking by Chief Justice Taney, said: 'In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and over-strict construction. 5 Wheat., 95.' So, in The

Schooner Industry, 1 Gall., 114, 117, Mr. Justice Story said: 'We are undoubtedly bound to construe penal statutes strictly; and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words and the mischiefs to be within the remedial influence of the statute.' In another case the same eminent jurist said: 'I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. * * * In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes the best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.'"

## SECOND.

### THE CONSTITUTIONALITY OF THE ACT.

In considering the question of the constitutionality of the act, we will consider it under two heads: DID CONGRESS HAVE THE POWER, UNDER THE COMMERCE CLAUSE, TO PASS THE ACT, AS AMENDED; and IS NOT THE ACT, AS AMENDED, VIOLATIVE OF THE FIFTH AND SIXTH AMENDMENTS OF THE CONSTITUTION?

The power of Congress over interstate commerce is not an unlimited power. The power of Congress is prescribed by the Constitution. And the power to regulate commerce is like all the other powers given by the constitution, and it can not and must not be construed to extend to regulations of police, which have been left with the States and cannot be assumed by the National Government.

In the case of Keller vs. U. S., 213 U. S., 138, this court, in holding the act of February 20, 1907, unconstitutional, said in part:

"In Patterson vs. Kentucky, 97 U. S., 501, 503, 24 L. ed., 1115, 1116, is this declaration:

" 'In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual States, and can not be assumed by the National Government.' Cooley, Const. Lim. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the States must observe in its exercise, the existence of such a power in the States has been uniformly recognized in this court. Gibbons vs. Ogden, 9 Wheat. 1, 6 L. ed., 23; License Cases, 5 How. 504, 12 L. ed., 256; Gilman vs. Philadelphia, 3 Wall., 713, 18 L. ed., 96; Henderson vs. New York (Henderson vs. Wickham), 92 U. S., 259, 23 L. ed., 543; Hannibal & St. J. R. Co. vs. Husen, 95 U. S., 465, 24 L. ed., 527; Boston Beer Co. vs. Massachusetts, 97 U. S., 25, 24 L. ed., 989. It is embraced in what Mr. Chief Justice Marshall, in Gibbons vs. Ogden, calls that 'immense mass of legislation' which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control.

"And in Barbier vs. Connolly, 113 U. S., 27, 31, 28 L. ed., 923, 5 Sup. Ct. Rep., 357, 359, it is said:

'But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.

"Further, as the rule of construction, Chief Justice Marshall, speaking for the court in the great case of

M'Culloch vs. Maryland, 4 Wheat. 316, 4 L. ed., 579, 601, declares:

'This government is acknowledged by all to be one of enumerative powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist.'

"In Houston vs. Moore, 5 Wheat. 1, 48, 5 L. ed., 19-30, Mr. Justice Story says:

'Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution.'"

In the case of United States vs. The Delaware and Hudson Company, 164 Fed. 229, Judge Gray said:

"The commerce clause of the Constitution is no exception to the general doctrine, *that unlimited power has no place in American Governmental institutions*, and that there are rights of liberty and property that are secure against hostile legislative action. (p. 228.)

"No one can read the history of the formation of the Constitution and of the conditions from which it sprang, without being impressed with the fact that the desire to preserve the individual right of the citizens of each State, to enjoy, untrammeled, that right of property which consisted in the ability to transport it into other States, free from the inhibitions and harassments that might theretofore have been imposed by the regulations of such other States, was one of the most important, if not the principal, of the impelling causes that brought about the Convention of 1787.

In contemplating this history, the thought cannot be avoided that, in conferring upon Congress and in denying to the States, this power of interstate regulation, it was meant to preserve, and not to destroy or impair, this important right of property, so essential to its full enjoyment, and to the individual liberty of which it is a part. (p. 229.)

"Moreover, this power, whatever its scope, certainly is subject to the limitations contained in the Constitution, and this can be said with especial emphasis as to those limitations found in amendments adopted after the ratification of the Constitution. (p. 229.)

"It seems perfectly plain, then, that Congress can not, in the exercise or pretended exercise of any legislative power conferred upon it, deprive any person within its jurisdiction of his liberty or property, without due process of law, nor can it be questioned that, with the possible exception of the war power, this is true, no matter under color of what power such deprivation is sought to be accomplished. No argument should be necessary, therefore, to show that this can not be accomplished by an enactment in assertion of power under the commerce clause of the Constitution." (pp. 229, 230.)

In the construction of this statute the trial court held that the amendment applied to a circular within the carton, as well as what was on the carton or bottle itself. In another part of the brief we dispute that proposition and we here say that if that was the intention of Congress, then it exceeded its authority, because that is not a regulation of commerce..

In McDermott vs. State of Wisconsin, 228 U. S., 115, this court held that the act extended to more than what was marked on the outside of the box of shipment, and one of the reasons therefor was that when the package was sold it disclosed, as an original package, to the purchaser before the purchase, the fact of misbranding. In this case the pur-

chaser could not in any way discover the alleged misbranding until the matter had ceased to be an article of interstate commerce and became part of his property, which if it could be legislated against at all, should be legislated against by the States.

It is further contended that a distinction should be made between commerce in articles that are illicit, immoral or harmful, and commerce in legitimate articles. If such distinction is drawn, the lottery cases and similar cases have no weight in this construction of the statute, because in those cases the powers over interstate commerce are given broad scope because the article of commerce was held to be illicit, immoral or harmful. The Sherley Amendment, however, covers all medicinal preparations, and includes, of course, legitimate articles of Commerce and, therefore, it is contended that no regulation can be imposed on such articles of commerce except such as may identify the article or state its ingredients, its physical constituents or chemical parts, and any attempt by Congress to enter the domain of speculative science and to establish criteria in matters of opinion which are incapable of proper judicial ascertainment and decision, such as the curative and therapeutic effect of a drug when taken by an individual, is not a regulation of commerce, and therefore beyond the power of Congress. Congress can require that all medicinal preparations shall be pure and correctly labeled as to their ingredients, but it cannot go into the domain of speculative science and seek to test the accuracy of statements as to the effect of a preparation when subsequently taken by a human being, in accordance with such directions as may accompany the preparation. The drug itself is the subject-matter of commerce. The print or label which it bears is but an incident to the commodity itself, and forms a part of the commerce in the article only insomuch as it deals with the identity of the

commodity contained in the package. A statement which gives no information of the commodity itself, its physical constituents, or its chemical ingredients, is not so related to the commodity as to form a part of the commerce in the article, and is not, therefore, a part and parcel of the commerce within the regulating power of Congress.

The Sherley Amendment attempts to deal solely with the latter type of statement. It seeks to cover statements as to what results will be produced when interstate commerce has ceased, and the commodity taken by individuals suffering from certain diseases or physical ailments. Such statements have been designated by this court as constituting only an estimate or prophesy concerning results. We submit that such statements form no part of interstate commerce. Congress, in attempting to bring the statements within its legislative power and to overcome what has been said by this court in U. S. vs. Johnson, 221, U. S., 488, uses the words, "false and fraudulent," instead of the words, "false and misleading," but we submit that that can not cure this defect.

If our contention in this regard is not correct, and it is held that Congress, under the guise of regulating commerce may enter into the boundless field that is opened by the Sherley Amendment, the police power of the State would be useless and would be constantly encroached upon by Acts of Congress. Most of the business transactions of this country relate in some way, direct or remote, to interstate commerce, and Congress might pass statutes regulating in every conceivable aspect not only the actual preparation and shipment of interstate commodities, but the prior conduct of the parties out of which the shipments arose, no matter how remote it may have been, or the subsequent conduct of the parties, no matter how far removed. Congress, for example, might enact a law making it a crime for anyone to

obtain property, by false pretenses, which at the time, was in the course of interstate shipment, or a statute making it a misdemeanor for any one to procure by false pretenses an interstate shipment of merchandise. Again, Congress might pass a law denouncing as a crime the making of puffing statements concerning the durability or ability to do work claimed for all manner of mercantile wares, household implements, farming machinery, etc. There would be no difference in principle between such a law and the Sherley amendment. There would be no difference in principle between a law that provided that a dealer in farm implements should not publish or advertise in the papers articles about his goods if they were to be shipped in interstate commerce, than a law prohibiting the placing in a carton a statement or leaflet in regard to those goods. This case would be no different if the leaflet were sent, not with the goods themselves, but by express or mail, to be attached to the goods after they arrived; or, if the goods were shipped without any labels, with the distinct understanding that the labels were to be placed thereon in the State, after they arrived, being printed in the State where the goods were sold. All would come under the interstate clause of the Constitution, because all, according to the contention of the government, would refer to an interstate matter. The courts would be doing that which it has said is the police power of the State, "the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good * * * *It is with the State to devise the means to be employed to such ends.*" (House vs. Mayer, 219 Pa., 270, p. 282).

Again, Congress was forewarned that such legislation as this was uncertain and indefinite, and without the powers

of Congress, and that brings us to consider the second ground on which the act is unconstitutional, that it is violative of the Fifth and Sixth amendments to the Federal Constitution.

The Fifth Amendment is as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, property, without due process of law; nor shall private property be taken for public use, without just compensation";

and the Sixth Amendment, is as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his pleasure, and to have the Assistance of Counsel for his defense."

The right of a person to advertise his own goods, wares and merchandise, and the right of a person to puff the same, are property rights, and as a person has a right to sell ordinary drugs and merchandise and enter into reasonable contracts in regard thereto, and as a person has a right to commend in a favorable manner his drugs or merchandise, when Congress attempts to invade that right, it deprives such a

person of an incident to his rights of property and violates the Fifth Amendment to the Constitution. Nor has Congress power to deprive a person of his liberty or property, without due process of law, and the proposition that such deprivation may be made under the power of Congress is monstrous. United States vs. Delaware & Hudson Company, 164 Fed. 229. This case was reversed in this court, 213 U. S. 412, but the court there gave to the statute a narrow construction, and said, by restraining the wider and, we think, doubtful prohibition, so as to make it accord to the more narrow and reasonable provision, it could be brought within the power of Congress.

We have already considered the objection to Congress, under its power to regulate Commerce, and entering into the domain of speculative science, and attempting to test the accuracy of claims as to the curative and therapeutic effect of a drug, but here we want to call in question the power of Congress to prevent a person from making statements or claims concerning the virtue of drugs, whether modest or extravagent, and we say that an owner, when advertising his drugs has a right to exploit them and advance opinions concerning the curative properties thereof, notwithstanding the fact that such opinions may be objected to by others, and that he may make claims as to the result which will follow the use of his drugs which to some may appear unreasonable, because, in doing so, he is only doing that which the law gives him the right to do. And that not only is this right given him by the Federal Constitution, but even if it were not so given him, where a question arises as to whether or not a person should be prosecuted for an offense or his property condemned, back of the prosecution or back of the condemnation, must be an offense or crime defined by law, not merely an offense that is to be determined by the state of public opinion, or of scientific opinion.

The very libels in these cases show that it was not intended to raise any question of fact as to the ingredients of the drugs, but merely the fact that, in the opinion of certain persons in the one instance, the drug could not be used as an effective preventive for pneumonia, and in the other, that it will not cure tuberculosis, because at present there is no cure for tuberculosis. The Act, as construed by the court and the government, and as it must be construed, is in direct violation of Article 6 of the Constitution, it being provided, among other things, in that article that "in all criminal transactions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed * * * *and to be informed of the nature and cause of the accusation.*" Back of the prosecution, under this section of the Federal Constitution, must be a crime defined by law, not merely a question of whether or not an act is unlawful, by reason of the present state of medical science, or whether or not, in the opinion of a certain class, a statement is false or fraudulent. It must be an act measurable by fixed standards that in law can be determined, and not merely by the speculative theories and contrary tenets of experimental science. The constitutional guarantee protecting the individual, in requiring the government to produce to him a sufficient information, or indictment, also requires the legislative department of the government to point out to him the crime or offense with which he is charged. In holding that the original act did not come into the realm of speculation, this court, in Johnson vs. U. S. said:

> "In view of what we have said by way of simple interpretation, we think it unnecessary to go into consideration of wider scope. We shall say nothing as to the limits of constitutional power, and but a word as to what Congress was likely to attempt. It was much more

likely to regulate commerce in foods and drugs with reference to plain matter of fact, *so that food and drugs should be what they professed to be, when the kind was stated, than to distort the uses of its constitutional power to establishing criteria in regions where opinions are far apart.* See American School vs. McAnnulty, 187 U. S., 94, 47 L. ed., 90, 23 Sup. Ct. Rep. 33. As we have said above, the reference of the question of misbranding to the Bureau of Chemistry for determination confirms what would have been our expectation and what is our understanding of the words immediately in point."

In the celebrated case of the American School of Magnetic Healing, *et. al.*, vs. J. M. McAnnulty, 187 U. S., p. 94, this court had before it a case wherein the Government contended that the appellant had violated the Post Office laws in using the Post Office for the purpose of fraud. The bill which was filed in that case to enjoin the putting into execution of the fraud order drew a distinction between what we might call fraud in fact and fraud that might be proven by opinions. This court held that it never could be inferred that Congress, in punishing the fraud, was punishing other than that which was a fraud in fact. The Court say:

"Because the claimants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers of the individual, and directing them towards the accomplishment of a cure of the disease under which he might be suffering, who can say that it is a fraud, or a false pretense or promise within the meaning of these statutes? *How can anyone lay down the limit and say beyond that there are fraud and false pretenses? The claim of the ability to cure may be vastly greater than most men would be ready to admit and yet those who might deny the existence or virtue of the remedy would only differ in opinion from*

*those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it can not be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities* by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, *which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity.* We may not believe in the efficacy of the treatment to the extent claimed by the complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court. The bill in this case avers that those who have business with complainants are satisfied with their method of treatment, and are entirely willing that the money they sent should be delivered to the complainants. In other words, they seem to have faith in the efficacy of the complainants' treatment, and in their ability to heal as claimed by them. If they fail, the answer might be that all human means of treatment are also liable to fail, and will necessarily fail when the appointed time arrives. *There is no claim that the treatment by the complainants will always succeed.*

"Suppose a person should assert that, by the use of electricity alone, he could treat diseases as efficaciously and successfully as the same have heretofore been treated by 'regular' physicians. Would the statutes justify the Postmaster General, upon evidence satisfactory to him, to adjudge such claim to be without foundation, and then to pronounce persons so claiming, to be guilty of procuring, by false or fraudulent pretenses, the moneys of people sending him money through the mails, and then to prohibit the delivery of any letters to him? The moderate application of electricity, it is strongly maintained, has great effect upon the human system, and just how far it may cure or mit-

igate diseases no one can tell with certainty. It is still in an empirical stage, and enthusiastic believers in it may regard it as entitled to a very high position in therapeutics, while many others may think it absolutely without value or potency in the cure of disease. Was this kind of question intended to be submitted for decision to a Postmaster General, and was it intended that he might decide the claim to be a fraud and enjoin the delivery of letters through the mail addressed to the person practicing such treatment of disease? *As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. Unless the question may be reduced to one of fact, as distinguished from mere opinion, we think these statutes can not be invoked for the purpose of stopping the delivery of mail matter.*

"Vaccination is believed by many to be a preventive of small pox, while others regard it as unavailing for that purpose. Under the statutes could the Postmaster General, upon evidence satisfactory to him, decide that it was not a preventive, and exclude from the mails all letters to one who practiced it and advertised it as a method of prevention, on the ground that the moneys he received through the mails were procured by false pretenses?

"Again, there are many persons who do not believe in the homeopathic school of medicine, and who think that such doctrine, if practiced precisely upon the lines set forth by its originator, is absolutely inefficacious in the treatment of diseases. Are homeopathic physicians subject to be proceeded against under these statutes, and liable, at the discretion of the Postmaster General, upon evidence satisfactory to him, to be found guilty of obtaining money under false pretenses, and their letters stamped as fraudulent and the money contained therein as payment for their professional

services sent back to the writers of the letters? And, turning the question around, can physicians of what is called the 'old school' be thus proceeded against? Both of these different schools of medicine have their followers, and many who believe in the one will pronounce the other wholly devoid of merit. But there is no precise standard by which to measure the claims of either, for people do recover who are treated according to the one or the other school, And so, it is said, do people recover who are treated under this mental theory. By reason of it? That can not be averred as a matter of fact. Many think they do. Others are of a contrary opinion. Is the Postmaster General to decide the question under these statutes?

*"Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.*

"It may, perhaps, be urged that the instances above cited by way of illustration do not fairly represent the case now before us, *but the difference is one of degree only It is a question of opinion in all the cases*, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, *yet after all, it is, in each case, opinion only, and not existing facts with which these cases deal.* There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and *it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained can not, like allegations of fact, be proved to be false, and therefore it can not be proved, as a matter of fact, that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and as, in our opinion, it is used in these statutes."*

From these authorities it will be seen that this court has held that the question of the curative and therapeutic effect of a drug is speculative, and not such as can be said to warrant an information or indictment, or a proceeding for condemnation, and this court, in so holding, have properly construed the amendment to Article Six of the Constitution, because it would be folly to hold that because you informed a person of the fact that he was to be prosecuted under a certain act, that you informed him of the nature and cause of the accusation, when that act is so vague and uncertain that no one can determine from it, except by weight of opinion, what the party had done to warrant a prosecution under the act. In other words, back of all criminal or quasi criminal proceedings must be not only a libel, information or indictment stating within its four corners a violation of law, but back of this libel, information or indictment must be a law that states specifically what is an offense. "In order to constitute a crime the act must be one of which the defendant is able to know in advance whether it is criminal or not." Fozer vs. United States, 52 Fed. Rep., 919.

In the case of Todd vs. United States, 158 U. S., 282, this court say:

> "It is axiomatic that statutes creating and defining crimes can not be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.' United States vs. Lacher, 134 U. S., 624; Endlich on the Interpretation of Statutes, Sec. 329, 2d ed.; Pomeroy's Sedgwick on Statutory and Constitutional Construction, 280."

In United States vs. Lacher, 134 U. S., 638, this court say:

> "As contended on behalf of the defendant, there can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute."

In the case of United States vs. Grimaud, 170 Fed. Rep., 210, the court, in speaking of this subject, states as follows:

> "It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its laws. This principle was expressed by the Supreme Court in *In re* Kollock, 165 U. S., 533, 17 Sup. Ct., 446, 41 L. Ed., 813, as follows: 'We agree that the courts of the United States, in determining what constitues an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution.' "

In the case of State vs. Mann, 2 Oregon, 241, the Court say:

> "A crime or public offense is some act prohibited by law; and it is a well-settled rule of law that no one can be punished for doing an act unless it clearly appears that the act sought to be punished comes clearly within both the spirit and letter of laws prohibiting it. The act constituting the offense should be clear, and specifically described in the statute, and with sufficient certainty at least to enable the Court to determine from the words used in the statute whether the act charged in the indictment comes within the prohibition of the law."

In the case of Brown vs. State, 131 Wisconsin, 543, reading from page 548, the Court say:

"It is a most fundamental canon of criminal legislation that a law which takes away a man's property or liberty as a penalty for an offense, must so clearly define the acts upon which the penalty is denounced, that no ordinary person can fail to understand his duty, and the departure therefrom which the law attempts to make criminal. One can not be said to wilfully violate a statute which is so contradictory or blind that he must guess or conjecture what is his duty thereunder."

In United States vs. Capital Traction Company, 34 App. D. C., 597, the Court say:

"This court, in the case of Czarra vs. Medical Supers., 25 App. D. C., 443, construing a statute which provided that any licentiate of the board was subject to have his license revoked upon being found guilty of unprofessional or dishonorable conduct, said: 'The single question to be determined is whether, independently of the causes mentioned, "unprofessional or dishonorable conduct," as declared in the act, are sufficiently specific and certain to warrant a conviction thereof and the exercise of the power of revocation by the board of medical supervisors. * * *

" 'In all criminal prosecutions the right of the accused to be informed of the nature and cause of the accusation against him is preserved by the 6th Amendment. In order that he may be so informed by the indictment, or information presented against him, the first and fundamental requisite is that the crime or offense with which he stands charged shall be defined with reasonable precision. *He must be informed by the law*, as well as by the complaint, what acts or conduct are prohibited and made punishable. In the exercise of its power to regulate the conduct of the citizen, within the constituional limitations, and to declare what shall constitute a crime or punishable offense, the legislature must inform him with reasonable pre-

cision what acts are intended to be prohibited.' To the same effect are Augustine vs. State, 41 Tex. Crim. Rep., 56; 96 Am. St. Rep., 765; 62 S. W., 77; State vs. Gaster, 45 La. Ann., 636; 12 So., 739; State vs. Mann, 2 Or., 238; *Ex parte* Jackson, 45 Ark., 158; Hewitt vs. State Medical Examiners, 148 Cal., 590; 3 L. R. A. (N. S.), 896; 113 Am. St. Rep., 315; 84 Pac., 39; 7 A. & E. Ann. Cas., 750.

"In a criminal statute, the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. Otherwise, there would be lack of uniformity in its enforcement. The dividing line between what is lawful and unlawful can not be left to conjecture. The citizen can not be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute can not rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the court upon another. As was said in United States vs. Reese, 92 U. S., 214, 23 L. Ed., 563: 'If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. * * * It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.' "

Having in mind these authorities and the attempt on the part of the government to include in this statute an issue involving the opinion of persons, how can it be said that the statute points out to a person acts that under it may be an offense? Instead of measuring the offense by the four corners of the statute, it would be measuring it by the prevailing opinion of persons at the time that the proceeding was brought. It might be that today the government could produce same persons, even scientists, who would say that there is no such thing as a cure for tuberculosis, but tomorrow these scientists may have seen the light of reason, or some of them may have made a further investigation and discovered a cure for tuberculosis. If that be so, then his libel might be good today and bad tomorrow. It might be that the substances here in question could be shown by scientists to be without efficacy as a preventive for pneumonia because of their effect on the heart or some other organ of the body, but tomorrow it might be shown by the same witness that, after a further investigation, such witness came to the conclusion that his first statement was erroneous. An offense today and not an offense tomorrow! A crime today and not a crime tomorrow! An offense in the eyes of some scientists, and not an offense in the eyes of other scientists! Not a question of law written within the four corners of the statute, but merely a question of the opinion of scientists or physicians! It seems almost incredible that it should be contended that under the Federal Constitution there could be a punishment based merely upon opinion, where there is no question except a difference of opinion on the point in issue. For instance, suppose we were to say that we know of cases of tuberculosis that have been cured. We take it that there is hardly a person who has had under his observation persons suffering from tuberculosis who has not seen wonderful cures. There is hardly

a physician who has not witnessed in his practice what we might call miraculous cures. The Christian Scientists have cured persons who have been bed-ridden for years. Cripples go to Lourdes in France, and return able-bodied persons. All of this is within the knowledge of men; all of it could be proven by persons who have seen. And yet physicians and scientists will say to you that such and such a disease can not be cured. Often, when interrogated, we find that they give to the word, "cure," a meaning that is not used for it in ordinary language, but, notwithstanding the fact that these physicians and scientists will often make these statements, if cross-examined they would be bound to admit that they have seen what everybody else has seen—persons cured of diseases held by physicians to be incurable. Dr. Howard M. Kelley, of Johns Hopkins University, claims that radium will cure cancer. Could he have been indicted under this Act if he had—would now—transmit in interstate commerce, radium, because the majority of physicians and scientists of this country would swear that there was no cure for cancer? No matter how honest, no matter how well-meaning Kelley may be in his statement, no matter how many people may agree or disagree with him, according to the government's contention, under this statute, he could be prosecuted; and the result of his prosecution would really depend not so much upon the opinion of the scientists that were for or against him, but upon the opinion of the jury who would try the case. And in the instant case, so far as the charge is made in regard to the statement about tuberculosis, the issue that would be tried would be determined by the jury, not necessarily upon the evidence produced, but upon the ground whether in their opinion they believed there was a cure for tuberculosis. So that we have a proceeding not only attempted to be founded upon the opinion of witnesses, but one which would ulti-

mately be decided by the opinion of the tryers. It is respectfully submitted that the Federal Constitution never intended that a defendant should be placed in any such position; that the statute must be so written that he who runs can read; that the libel, information or indictment, following the statute, must distinctly set forth an offense with all its elements, and that where that offense includes false and fraudulent statements the facts relied upon must be set forth that the defendant may have before him not only the law that specifically creates the offense, but the indictment of the government that specifically states the offense; and that if this is not handed to the defendant by the government, then no law requires him to answer, and his objection in law is well taken.

It is respectfully submitted, for the reasons herein stated, that the act is unconstitutional, and it should be so held.

## III.

### The Objections to the Libel.

In considering the objections to the libel, we will consider all of the assignments under this head, subdividing it as we proceed. In the first place, we state that no prosecution can be had under this statute unless the libel, information or indictment specifically and directly pointed out to the party charged wherein he has violated the law.

THE LIBEL IS NOT SPECIFIC IN THAT IT DOES NOT DIRECTLY POINT OUT TO THE DEFENDANT WHEREIN THE DEFENDANT HAS VIOLATED THE LAW.

This first proposition involves to a certain extent some matters that we considered when we considered the constitutionality of the act, because we contend that even though the act was constitutional, that the libel itself fails

to set out, as provided in Article Six of the Amendments to the Constitution, the nature and cause of the accusation; in other words—even admitting the law on which the libel, information or indictment is based, to be valid in all criminal prosecutions, the accused is entitled "to be informed of the nature and cause of the accusation." This constitutional guarantee protects the individual in requiring the government not only to produce a valid statute under which he is to be prosecuted, but to produce to him a sufficient libel, information or indictment containing the charge, as well as requiring the legislative department of the government to point out the law containing the specific charge that is contained in the libel, information or indictment. In order to constitute a crime or an offense under the Pure Food Law the act must be such a one as the party is able to know in advance from the law whether it is criminal or not, and the charge contained in the libel, information or indictment must be such as specifically points out wherein the defendant has violated that law. In other words, in this case, the chart under which the government is proceeding is Section 8, as amended, and not only must we read in that section an offense, but the libel in this case must show that the offense charged is, if true, an offense under that section. There is no such thing as constructive offenses, nor is there any such thing as charging indirectly or constructively an offense. The rule, as applied to statutes, requiring that statutes creating and defining crimes can not be extended by intendment, and that no act, however wrongful, can be punished under a statute, unless clearly within its terms, is also supplemented by the rule that when we read the libel, information or indictment, we must find all the elements of the offense which the statute charges.

This is axiomatic, and hardly needs authorities to support it. It has, however, been decided by this Court:

"This offense is purely statutory. A proceeding under the statute must not only set out a description of the charge in the substantial words of the statute, but it is fundamental law of criminal procedure that the defendant charged must be apprised with reasonable certainty of the nature of the accusation against him, to the end that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense." United States vs. Symonds, 96 U. S., 360.

And again,

"If an indictment upon a statute does not sufficiently set forth the offense in the words of the statute, unless those words of themselves fully and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." United States vs. Carll, 105 U. S., 611.

And again,

"The language of the statute, used as an indictment or charge, must be accompanied with such a statement of facts as will inform the accused of the specific offense coming under the general description with which he is charged." United States vs. Hess, 124 U. S., 483, cited and referred to in Pettibone vs. United States, 148 U. S., 202; Blitz vs. United States, 153 U. S., 315; Evans vs. United States, 153 U. S., 587; Ledbetter vs. United States, 170 U. S., 610.

With this view of the law, as stated by this Court, we come now to consider whether or not, within the four cor-

ners of these libels, there are any charges of offenses under the Pure Food Law, as amended, and whether or not there is set up in these libels any facts sufficient to require an answer, or facts upon which an issue might be joined, on which issue it could be decided whether or not there is a violation of the Pure Food Law, as amended. It may be stated as a proposition that will not be contradicted, that there could be no prosecution of the defendant upon these libels, under the Pure Food Law as it originally stood, and therefore we have to find in paragraph 3 of Section 8 of the Act the offense intended to be charged, and in the several libels facts that show, if true, an offense under said paragraph.

There are so many imperfections in the libel that one hardly knows which one to take up first, but before taking up and considering what we might call the important propositions involving whether or not there is stated a violation of the Act, as amended, let us briefly refer to wherein the libels are defective in not giving to the defendant any notice whatever of any offense or any violation of the Pure Food Law, and this brings us to consider the libel itself.

## IV.

### These Libels do not State, or Properly State, any Violation of the Pure Food Law, as Amended.

In considering this proposition, we shall treat it as follows:

(A) There is no proper statement of the contents of the circulars.

(B) There is no statement, nor is it contended, that the alleged statements mentioned in the libels anywhere appear on the original packages, or on the bottles themselves.

(C) There is no statement that the statements alleged to be on the circulars, are false.

(D) Not only was there no statement of facts anywhere showing that said alleged statements contained in said circulars are fraudulent, but the libels themselves negative that fact.

(A)

THERE IS NO PROPER STATEMENT OF THE CONTENTS OF THE CIRCULAR.

An examination of the libels will show that there is no attempt to set out the contents of the circular on which it is alleged certain words appear, nor is there any statement as to where in the circular, or under what circumstances, appear the words, "Effective as a preventative for pneumonia," or the words, "We know it has cured and it has and will cure tuberculosis." These two statements are coupled together in the libel, and, although they pertain to different matters, so far as the libel is concerned they might be part of one sentence. The first expression, "Effective as a preventative for pneumonia," fails to show whether it is taken as a part of a sentence, or in what way it has been used, but from the way it is referred to in the libel it appears as though it is a part of a sentence incomplete in itself and unconnected in every way with the other statement that accompanies it. These two statements, placed as they are in the libel, are of themselves meaningless. It may be that they are so connected in the circulars as not even to be such a statement as the government could for a moment consider a violation of the Food and Drugs Act. The government might as well have alleged that the use of the word, "effective," unconnected with anything else, constitutes a violation of the law, or that the use of the word, "preventative," or the use of the word "cure," is a violation of the law, as to take these two expressions contained

in the libel, apparently treat them as one, and attempt to say that this is a violation of the Food and Drugs Act, as amended. It is respectfully submitted that where it is alleged that a statement is contained in the circular, the court should have before it, if not the whole circular, still a sufficient part to show how in the sentence the words were used.

In quashing the indictment in the recent case of United States vs. Tom Watson, the judge, referring to the indictment, stated that it only contained abstract and unconnected parts of the alleged immoral writing; said that the indictment was bad; that all of the articles should have been set out, and he referred to the old and apt illustration about the Bible saying there is no God, leaving out the words that showed this statement was made by a fool. This proposition is not only supported by authority, but it is elemental; it being a well-known principle of law that where there is used a written instrument as a ground for an offense or cause of action, such instrument must be set out either in its legal effect or in substance, and it can not be referred to by disconnected parts or sentences.

The case of McClure vs. Review Publishing Company, 38 Wash., 160, is a case in point. This was an action for libel, the declaration setting out merely excerpts of the articles. Upon motion it was ordered that the whole article be set out, and then there was filed to the declaration a demurrer. On appeal one of the errors assigned was the action of the Court in sustaining the motion to make the complaint more definite and certain. The Court said:

> "We do not think that the Court committed error in this respect. An alleged libelous newspaper like every other article, agreement or instrument in writing, the meaning of which has to be ascertained, must be construed in connection with and with reference to

> the entire article, and no intelligent construction can be obtained by a perusal of excerpts or disconnected extracts from the publication. In this case the complaint objected to simply extracting from the articles published, certain words and lines which were alleged to be libelous. A glance at the said words and lines, when presented in their proper connection with, and in relation to, the whole article, shows the futility of undertaking to justly construe these words and lines, segregated from the article as a whole."

Again, in the case of Edgerly vs. Swain, 32 N. H., 481, the Court say:

> "Although the plaintiff need not set out all the words spoken, he must set forth enough to show the sense and connection in which they were used."

In the case of Com. vs. Wright, 55 Mass., 62, the Court, speaking through Forbes, Justice, in passing upon the sufficiency of an indictment for a libel setting forth that the defendant published, and so forth, an unlawful and malicious libel according to the purport and effect and in substance as follows:

> Held: "Another objection to the indictment is that it does not profess to set forth the very words or tenor of the alleged libel, but only the purport, effect and substance thereof. It is a general rule of pleading in civil as well as in criminal cases that when a charge is brought against a defendant arising out of the publication of a written instrument, the instrument itself must be set out in the writ or indictment."

In the case of Schubert vs. Richter, 66 N. W., 107-108, the Court said:

"The complaint entirely fails to state or allege what particular words were spoken by the defendant, which the plaintiff claims were defamatory. It merely states the pleader's inferences or conclusions drawn from something supposed to have been said, but not alleged. 'The words in which the slander is conveyed must be stated in the complaint, in order that the court may judge whether they constitute a ground of action, and also, because the defendant is entitled to know the precise charge against him, and can not shape his defense until he knows it. It is not sufficient to set forth the tenor or effect of the words used by the defendant.' "

From these authorities it is respectfully submitted that the defendant in the several cases is entitled to have before the Court, as pleadings, the circular, or at least a sufficient part of the circular to show the manner in which these statements were used. There can be no question but that the first part of the statement, "effective as a preventative for pneumonia," being unconnected in substance and grammatical connection with the second part of the statement, should be stricken out of the libel. It has neither beginning nor end. It shows neither the beginning nor ending of a sentence. In fact, it shows the contrary, it being a part of a sentence not even between commas.

(B)

THERE IS NO STATEMENT, NOR IS IT CONTENDED THAT THE ALLEGED STATEMENTS MENTIONED IN THE LIBELS ANYWHERE APPEAR ON THE ORIGINAL PACKAGES, OR ON THE BOTTLES THEMSELVES.

There can be no proceeding under the Pure Food and Drugs Act to condemn drugs, unless alleged fraudulent and

false statements appear on the original packages, or on the bottles themselves. There can be no seizure where the statements are not contained on the label or on the package. The object of the Pure Food Law is to prevent a person from exposing his wares to the public, with false and fraudulent statements thereon. As amended, Section 8 of the Act reads:

> "Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

In order to determine what is meant by this paragraph, it is necessary to consider all of Section 8, and determine from a proper construction of the whole section what Congress added thereto when Section Third was read into the Act by what was known as the Sherley Amendment. This Court, in the case of Johnson vs. United States, 221 U. S., 488, held that Section 8, as it stood in the original Act, did not include statements or declarations in regard to the curative or therapeutic effect of a drug, and therefore, in order to cure this defect, the third paragraph of Section 8 was added by the Act of August 28, 1912. Indeed, standing alone, the third paragraph, properly construed, can not be said to include something written or printed on a circular contained in a package, for this paragraph reads as follows:

> "If its package or label shall bear or contain any statement, design, or device," etc.

In order to get the interpretation of the government, you have to read this Act as follows: "If its package or label shall bear or contain in it any statement, design or device," or you have to read it thus: "If its package con-

tain therein or the label bear thereon any statement, design or device." So far as the first statement is concerned, it is senseless. So far as the second is concerned, you have to change the verb "contain," and place it in the statute before the verb "bear." If you say that to each one of the nouns there is applied a verb, then you would read it as follows: "If its package * * * shall bear any statement, design, or device," and again: "If its * * * label shall contain any statement, design, or device." You can not read it: "If its package or labels shall bear thereon or contain therein any statement, design, or device," because the words, "thereon," and "therein," are not in the statute, and because the word, "therein," added after the word "contain," would make little sense as applied to a label, because you would hardly say, "If its label contain therein any statement, design, or device." You can, however, read it, "If its package or label shall contain thereon any statement, design, or device," and the word, "thereon," applies to both package and label, and also applies to both, "bear" and "contain."

Again, if its package shall bear or contain any statement, or if its label shall bear or contain any statement, in order to give to this word, "contain," the meaning claimed for it by the government, when applied to the label, it would have one meaning, "something printed thereon," and when applied to the package it would have another meaning, "something printed on something else, but placed in the package." Would you really not have to extend the meaning of the package to say that the word "contain," applied to something printed on a circular that was within the package? In other words, the statement, "design or device," would be contained in the circular, and the circular would be contained in the package. It can hardly be contended that such interpretation can be made of this Act, but that it must

be taken in its ordinary meaning and that the words, "bear or contain," apply to both package and label with the same meaning.

In interpreting this paragraph, we have been considering it by itself, unconnected with the subject-matter of Section 8, to which it belongs. If you connect it with Section 8, and give it the meaning that the government contends for, then you have the law in this situation, that a person could be punished for a statement as to the curative and therapeutic effect of a drug, printed on its circular, when he could not be punished for a statement of its ingredients, whether poisonous or non-poisonous, contained in the same circular. You could write anything in the circulars you wanted, however false and fraudulent, in regard to the chemical ingredients of any particular article, and there could be no prosecution under the law. You could say in the circular that the ingredients contained no poisonous matters, or no poisonous substances, and if such statement was false and fraudulent, there could be no prosecution. Or you could say in the circular that there is contained herein no alcohol, morphine, cocaine, etc., or any other substances that are mentioned in paragraph second of Section 8, and although this statement were false, there could be no violation of this law. Also, if you stated in the circular that this substance contains no poison, and will cure a headache, there could be no prosecution under the Food and Drugs Act, for the first part of the statement, although it might be a deadly poison; but there could be a prosecution for the second part, that it will cure a headache, if it could be shown that such statement was false and fraudulent. It is respectfully submitted that such an interpretation of the Act would be absurd, and is against the very wording of the Act itself. To say that a printed circular could make all kinds of false statements in regard to the chemical contents of a substance,

and that there was no prosecution therefor, but if in that same circular there was a puffing of the goods and a statement as to what the curative and therapeutic effect of the goods was, that there could be a prosecution, to our mind, is startling.

We say that under Section 8, as it originally stood, there can be no prosecution for anything printed in a circular, and we base our contention not only on the reading of the Act itself, but on the case of United States vs. American Druggist Syndicate, 186 Federal Reporter, 387, construing this section. In that case the Court held that the printed matter must be upon the label or outside of the package, and after referring to several parts of Section 8 of the Act, the Court say:

> "The plain sense of the language in question is that it embraces any statement, design or device regarding the article which appears on the outside of the package in which the drug is offered for sale, whether such statement be printed upon or otherwise affixed to the package itself or impressed upon a separate label which is then affixed to the package. An advertising circular inclosed with an article inside the carton in which it is offered for sale neither induces the sale nor deceives the prospective purchaser, and is not within the purview of the Act."

Again, in the case of McDermott vs. State of Wisconsin, 228 U. S., 115, this Court held that it was the intent of the Pure Food Act to exclude poisonous and adulterous foods from interstate commerce, and that it was a too narrow construction of the Act to try to limit the requirements of the Act to the outside box which is not seen by the purchasing public, but they held that the word "package," or its equivalent, referred to the immediate container of the article

which is intended for consumption by the public. This Court, speaking of this, say (p. 131):

> "The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine and food, and in order that its protection may be afforded to those who are intended to receive its benefits the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the Act, and for the reasons we have stated we think the requirements of the Act of Congress, as so construed, clearly within the power of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the Act by the federal courts."

Indeed it might be well contended that that which is only visible after the package becomes what we might call domestic, and is only then exhibited for the first time to the purchaser, could hardly be said to be subject to the power of Congress, but would be one subject more to the police power of the State than the power of the federal government.

## (C)

### There is No Statement that the Statements Alleged to be in the Circular are False.

The several libels state: "The statement, 'effective as a preventative for pneumonia,' appearing on the circular enclosed as aforesaid in the package containing each bottle is false, fraudulent and misleading in this, to wit, *that it conveys the impression to the purchaser that said article of drug can be used as an effective preventative for pneumonia, whereas, in truth and in fact, the said article of drug could not be so used;* and the statement, 'We know it has cured

and that it has and will cure tuberculosis,' appearing on the aforesaid circular inclosed as aforesaid, in each package containing said article of drug is false, fraudulent and misleading, in this, to wit: *that it conveys the impression to the purchaser that said articles of drug will cure tuberculosis or consumption, whereas, in truth and in fact, said articles of drug would not cure tuberculosis or consumption, there being no medical substance or mixture known at the present time which can be relied upon for the effective treatment or cure of tuberculosis or consumption.*"

Taking each of the statements separately,

First: "The statement, 'Effective as a preventative for pneumonia,' appearing on the circular inclosed, as aforesaid, in the package containing each bottle, is false, fraudulent and misleading in this, to-wit: that it conveys the impression to the purchaser that said article of drug can be used as an effective preventative for pneumonia, whereas, in truth and in fact, said article of drug could not be so used."

There is in this statement no averment of fact that the allegation "Effective as a preventative for pneumonia," is false. The only assertion contained therein is that the statement conveys the impression to purchasers that the article of drug can be used as an "effective preventative for pneumonia," when in truth and in fact said article can not be so used.

We might ask why can not the said article be so used? Is there anything it that prevents its use, or is the use of it useless? Certainly the defendant is entitled to know the position of the government in this matter. Is the government going to attack our drug because it contains ingredients that show that it is not effective as a preventative for pneumonia, or is the government merely going to show that by reason of the ingredients it can not be so used?

Or is the government going to show by the opinion of physicians that in their opinion it can not be so used?

It must be remembered that the Sherley Amendment in no way destroys the origin of prosecution under the law. That origin is still the Bureau of Chemistry, and from it the defendant should have some notice as to whether the chemical properties of the ingredients in the drug are going to be attacked, and if so, wherein they are going to be attacked, or whether merely it is going to become a question of opinion as to whether there is anything in the product produced by the defendant that is effective as a preventative for pneumonia. It would appear from the way in which the charge is made against the defendant that the libel, as framed, was really intended to be a charge that the defendant was misleading the public, because it does not rely upon the falsity, from the viewpoint of the defendant, but from the impression that is given to purchasers. As this charge, being a charge in regard to the curative and therapeutic effect of the drug, can in no way come under that part of the statute which punishes false and misleading statements, it is submitted that the pleader, in making the statement as to the impression to purchasers, failed of his purpose, and that there should have been not only a direct allegation of the falsity of the statement, "Effective as a preventative for pneumonia," but there should have been stated facts showing wherein that falsity lies. This would have been easy for the pleader to have done if it were possible to find some one who would be willing to swear, without swearing falsely, that the drug here in question was not effective as a preventative for pneumonia. This would have been easy if the Bureau of Chemistry, from its analysis, could produce evidence showing that there were no ingredients in the drug that could be used as a preventative for pneumonia.

Taking the word "false," as contained in the libel, it would appear to be merely untrue. This, of course, is not sufficient for a prosecution under the statute. "Falsely," when used as a foundation for a criminal prosecution, or a quasi criminal proceeding like this, means something more than merely untrue. As has well been said, "'Falsely' means something more than untrue; it means something designedly untrue, deceitful, and implies an intention to perpetrate some treachery or fraud, and hence, as used in Acts, General Assembly, Chapter 185, paragraph 11, providing that if an inspector of illuminating oil shall falsely brand any barrel, etc., the inspector is not liable for inaccurate, erroneous or faulty test or brand." Hatcher vs. Dunn, 71 Northwestern, 343.

Again, "'false,' in jurisprudence usually imports something more than the vernacular sense of erroneous or untrue. The word is often used to characterize a wrongful or criminal act such as involves an error or untruth intentionally or knowingly put forward. A thing is called false when it is done or made with knowledge, actual or constructive; it is untrue or illegal, or is said to be done falsely, when the meaning is that the party is in fault for its error." Ratterman vs. Ingalls, 48 Ohio State, 468.

"Falsely," as used in an instruction stating that it is for the jury to determine whether the defendant falsely represented certain facts, will be construed to mean something more than mistakenly or untruly, and can not be construed otherwise than to mean something designedly untrue or deceitful, and as involving an intention to perpetrate some fraud. State vs. Brady, 100 Iowa, 191.

Second. "The statement, 'We know it has cured and that it has and will cure tuberculosis,' appearing on the aforesaid circular enclosed, as aforesaid, in each package containing said articles of drug, is false, fraudulent and mislead-

ing in this, to-wit, that it conveys the impression to purchasers that the said article of drug will cure tuberculosis, whereas, in truth and in fact, said article of drug will not cure tuberculosis or consumption, there being no medical substance or mixture known at the present which can be relied upon for the effective treatment or cure of tuberculosis or consumption."

Not only is this statement in the libels subject to the criticism of the first statement, but it is also subject to this criticism, that it shows on its face that the only issue attempted to be raised by it is whether or not there is known to the medical profession a drug or substance that is a cure for tuberculosis. It admits that it raises merely a question of opinion, and no question of fact. It does not answer that part of the statement which says, "We know it has cured," nor that part of the statement, "And that it has and will cure tuberculosis," by any fact an issue upon which could subject the defendant to a seizure of their goods or punishment. If it was a fact that this drug had not cured tuberculosis, why can not the government say so? If it is a fact that it will not cure tuberculosis, or that its ingredients are such that none of them, or all of them together, will cure tuberculosis, why can not the government say so? But instead of attempting to raise a question of fact, it attempts to put in issue merely the question of whether or not there is a drug or substance that can cure tuberculosis. This is directly in the teeth of the Johnson decision, and directly contrary to all authority.

In the case of United States vs. Johnson, 221 U. S., 488, this Court had before it the original Act, and they held that the original Act did not include statements affecting the curative and therapeutic effect of drugs, but merely statements as to the chemical ingredients contained therein. This Court say:

"It is a postulate, as the case comes before us, that in a certain sense the statement on the label was false, or at least, misleading. What we have to decide is whether such misleading statements are aimed at and hit by the words of the Act. It seems to us that the words used convey to an ear trained to the usages of English speech a different aim; and although the meaning of a sentence is to be felt rather than to be proved, generally, and here, the impression may be strengthened by argument, as we shall try to show.

"We lay on one side as quite unfounded the argument that the words 'statement which shall be misleading in any particular,' as used in the statute, do not apply to drugs at all,—that the statements referred to are those 'regarding such article,' and that 'article' means article of food, mentioned by the side of drugs at the beginning of the section. It is enough to say that the beginning of the sentence makes such a reading impossible, and that 'article' expressly included 'drugs,' a few lines further on in what we have quoted, not to speak of the reason of the thing. But we are of opinion that the phrase is aimed not at all possible false statements, but only at such as determine the identity of the article, possibly including its strength, quality, and purity, dealt with in paragraph 7. In support of our interpretation the first thing to be noticed is the second branch of the sentence: 'Or the ingredients or substances contained therein.' One may say with some confidence that in idiomatic English this half, at least, is confined to identity, and means a false statement as to what the ingredients are. Logically it might mean more, but idiomatically it does not. But if the false statement referred to is a statement of identity as applied to a part of its objects, idiom and logic unite in giving it the same limit when applied to the other branch, the article, whether simple or one that the ingredients compose. Again, it is to be noticed that the cases of misbranding, specifically mentioned, and following the general words that we have construed, are all cases analogous to the statement of identity, and not

at all to inflated or false commendation of wares. The first is a false statement as to the country where the article is manufactured or produced,—a matter quite unnecessary to specify if the preceding words had a universal scope, yet added as not being within them. The next case is that of imitation and taking the name of another article, of which the same may be said, and so of the next, a substitution of contents. The last is breach of an affirmative requirement to disclose the proportion of alcohol and certain other noxious ingredients in the package,—again a matter of plain past history concerning the nature and amount of the poisons employed, and an *estimate or prophecy concerning their effect*. In further confirmation, it should be noticed that although the indictment alleges a wilful fraud, the shipment is punished by the statute if the article is misbranded, and that the article may be misbranded without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares but a very different and unlikely step to make them answerable *for mistaken praise*. It should be noticed still further that by paragraph 4, the determination whether an article is misbranded is left to the Bureau of Chemistry of the Department of Agriculture, which is most natural if the question concerns ingredients and kind, *but hardly so as to medical effects*.

"To avoid misunderstanding, we should add that, for the purposes of this case, at least, we assume that a label might be of such a nature as to import a statement concerning identity, within the statute, although in form only a commendation of the supposed drug. It may be that a label in such form would exclude certain substances so plainly to all common understanding, as to amount to an implied statement of what the contents of the package were not; and it may be that such a negation might fall within the prohibition of the act. It may be (we express no opinion upon that matter) that if the present indictment had alleged that the contents of the bottles were water, the label so distinctly implied

> that they were other than water, as to be a false statement of fact concerning their nature and kind. *But such a statement as to contents, undescribed and unknown, is shown to be false only in its commendatory and prophetic aspect, and as such is not within the act.*"

It was this decision that caused the amendment, but the amendment does no more than this: It makes statements in regard to the curative or therapeutic effect of drugs punishable where those statements are *false and fraudulent.* So far as their being false is concerned, if that is all that the amendment required, the amendment would only have added to the statute the punishment for the statements of curative and therapeutic effects in the same manner as statements were punished under the original act as to the ingredients and chemical contents of the drug. So that if the amendment, aside from the addition of the words, "false and fraudulent," had been part of the original Act, then the dissenting opinion of Justice Hughes would have been the law, and in that dissenting opinion he states positively and emphatically that no man can be punished merely for his opinions. He contends, however, that there might be a statement as to the curative and therapeutic effect of a drug false, without delving into the realm of opinion, and he states his proposition in this way:

> "The argument is that the curative properties or articles purveyed as medicinal preparations are matters of opinion, and the contrariety of views among medical practitioners, and the conflict between the schools of medicine, are impressively described. But, granting the wide domain of opinion, and allowing the broadest range to the conflict of medical views, there still remains a field in which statements as to curative properties are downright falsehoods and in no

sense expressions of judgment. This field I believe this statute covers."

Again, he says:

"Nor does it seem to me that any serious question arises in this case as to the power of Congress. I take it to be conceded that misbranding may cover statements as to the strength, quality and purity. *But so long as the statement is not as to matter of opinion, but consists of a false representation of fact,—in labeling the article as a cure when it is nothing of the sort from any point of view, but wholly worthless,—there would appear to be no basis for a constitutional distinction.* It is none the less descriptive—and falsely descriptive —of the article. Why should not worthless stuff, purveyed under false labels as cures, be made contraband of interstate commerce, as well as lottery tickets? Lottery Case (Champion v. Ames), 188 U. S., 331, 47 L. ed. 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

"I entirely agree that in any case brought under the act for misbranding—by a false or misleading statement as to curative properties of an article,—it would be the duty of the court to direct an acquittal when it appeared that the statement concerned a matter of opinion. *Conviction would stand only where it had been shown that, apart from any question of opinion, the so-called remedy was absolutely worthless, and hence the label demonstrably false; but in such case it seems to me to be fully authorized by the statute.*

"Accordingly, I reach the conclusion that the court below erred in the construction that it gave the statute, and hence in quashing the indictment, and that the judgment should be reversed."

From this opinion it certainly follows that this Act, as amended, does not permit an issue to be joined on an opinion as to whether or not there can be a drug that will cure tuberculosis.

It is submitted that the word, "false," in the statute, is intended to include only such cases where the so-called remedy is absolutely worthless, that there is nothing in any of the ingredients, or all of them combined, that in the opinion of anyone can aid in the cure of tuberculosis. That no such issue is raised by the libels is certain, and therefore there is nothing for defendant to answer. There must be, in order to base a prosecution, a false representation of fact, not of opinion, and as no such issue could be joined on these libels, it would put at issue the question as to whether or not, as a fact, the substance here involved has cured and will cure tuberculosis—this statement raises no legal issue to be tried.

We repeat that this matter has been settled by this Court, and again we quote from Justice Hughes' dissenting opinion in the Johnson case:

> "But so long as the statement is not as to matter of opinion, but consists of a false representation of fact—in labeling the article as a cure when it is nothing of the sort from any point of view, but wholly worthless, —there would appear to be no basis for a constitutional distinction. It is none the less descriptive and falsely descriptive of the article."

But no prosecution would lie, or no seizure could be had of these goods for a false or misleading statement. No matter how misleading the statement may be, no matter how false the statement may be, no prosecution can lie under the Act for such false and misleading statement, no seizure can be had under the Act. The Sherley Amendment uses the words, "false and fraudulent," and that brings us to consider our last proposition in considering the contents of these libels.

(D.)

NOT ONLY IS THERE NO STATEMENT OF FACTS ANYWHERE IN THE LIBELS SHOWING THAT THE ALLEGED STATEMENTS CONTAINED IN SAID CIRCULARS ARE FRAUDULENT, BUT THE STATEMENTS IN THE LIBELS NEGATIVE THAT FACT.

The words, "false" and "fraudulent," have different meanings, and when the Amendment added to the word, "false," the word "fraudulent," it meant something. The word "misleading," as used in the libels, is out of place. No person can be punished under the Pure Food Law, as amended, no goods can be seized, unless the statements are false and fraudulent. "False and misleading" would not be sufficient. "False" alone would not be sufficient. "Fraudulent" alone would not be sufficient. But the statements must be "false and fraudulent."

> "The adjectives, 'false' and 'fraudulent,' express different qualities of the noun, 'truth,' and therefore plaintiff's allegation that defendant's proof of compliance with the pre-emption act was false and fraudulent is not well controverted by a literal denial thereof in his answer, since he has not denied that the proof was false or fraudulent, but only that it was false and fraudulent." Miller vs. Tobin, 18 Federal Reporter, 609.

A thing may be false and not fraudulent. A thing may be fraudulent and not false. Under this Act, as we have stated, it must be both false and fraudulent.

The word "fraud," or the word "fraudulent," of itself is a mere conclusion of law, and in order to determine whether or not an issue of fraud is raised, is it necessary that there be facts set forth in the pleadings showing that a fraud has been committed—mere use of adjectives not being sufficient.

Fraud, as defined by Judge Ewing in Ball vs. Liby, Ky., 4th Dana, 370, "consists in a wilful misrepresentation of facts or in fraudulent concealment of them, with a view to deceive. If a party honestly believe the representation which he makes to be true, he is guilty of no moral turpitude or legal responsibility for making them."

> "The word 'fraud' implies 'moral turpitude.' "—Hagerman vs. Buchanan, 45 New Jersey Equity, 292.

> "Fraud has a well defined meaning at law. It may be said to be a false representation of fact, with knowledge of its falsity, and with intent that it be acted upon when the person to whom it is made acts upon it and by so doing suffers an injury."—Byerd vs. Holmes, 34 N. J. Law, 296.

> "The word 'fraud' imports a guilty knowledge, and there is no possibility that an act of fraud can be committed without a fraudulent intent, so that a definition of 'defraud' as to deprive of a right either by taking something by deception or artifice, or by taking something wrongfully without the knowledge or consent of the owner, is erroneous as not requiring criminal intent."—People vs. Wyman, 32 N. Y. Supp., 1037.

The adjective "fraudulent" in law must have the same elements as the noun "fraud." "Fraudulent" is defined objectively as based on, proceeding from or characterized by fraud. "Fraudulently" is an adverb of the same meaning, and is used in Code, Civil Procedure, paragraph 865, providing for the proof of wills of certain cases, and that the plaintiff is not entitled to a judgment establishing a lost or destroyed will unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime. To characterize the manner of destruction cited by the statute, as I construe the statute and construe the term

"fraudulent," as applicable thereto, it appears to me that in order to come within the lines thereof there must be some intervening human agency in motion, or set in motion, to have brought about its destruction. We are unable to see how the mere accidental destruction of this instrument through the fault of no one, through the active agency of no one, can be construed or deemed as of a fraudulent character so as to permit the application of this statute."—*In re* Reiffield's Will, 75 N. Y. Supplement, 805.

> "In equity, all acts, omissions and concealments which involve a breach of legal or equitable obligation or duty, trust or confidence justly reposed, and which are injurious to another or by which an undue or unconscionable advantage is taken of another are considered fraudulent."—Fourth Bouvier's Institute, 167.

From these definitions it appears that by the use of the word "fraudulent," in the Sherley Amendment, it was intended that the statement made must be a fraudulent act on the part of the person making it, that the party making the statement must be guilty of some act of moral turpitude. Not only is the libel silent as to any fraudulent act on the part of the defendant, but it affirmatively negatives the idea that there was any fraudulent act, if its statements of attempted denial can be said to deny anything. Before taking up, however, and considering these statements, we desire to call attention to this proposition of law. The words "fraud" and "fraudulent" are mere conclusions of law, and the mere use of them in a pleading is of no effect. The pleading must state facts showing the statements to be fraudulent. Fraud is a conclusion of law, and hence an allegation of fraud is not an allegation of fact constituting a cause of action sufficient to authorize the Court to pronounce judgment.—Phoenix Insurance Company vs. Moog, 78 Ala., 284

"To characterize an act as fraudulent in a pleading does not in legal effect charge it as fraudulent unless some circumstance or fact be charged which shows in what the fraud consists and how it has been effected." —Cochise County vs. Copper Queen Company, 71 Pacific, 946-949.

"The words 'fraud' and 'conspiracy,' alone, no matter how often repeated in a pleading, can not make a case for the interference of a court of equity until connected with some specific acts for which one person is in law responsible to another. They have no more effect than other words of unpleasant signification. While in this case the offensive words are used often enough, the facts to which they are applied are not such as to make the defendant answerable to the complainant for the damages and other relief asked."—Ambler vs. Choteau, *et al.*, 107 U. S., 586-591.

In the case of St. Louis & San Francisco Railroad Co. vs. Johnson, 133 U. S., 566-578, this Court say:

"And if fraud is relied on it is not sufficient to make the charge in general terms. Mere words in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction unless the transactions to which they are referred are such as in their essential nature constitute a fraud or breach of trust for which a court of chancery may give relief. * * * The defendant should not be subjected to be taken by surprise, and enough should be stated to justify the conclusion of law, though without undue minuteness."

Again, in Fobb vs. Blair, 139 U. S., 118-127, this Court on page 127, say:

"As he impugns the good faith of the transaction between the company and the contractors, it was incumbent upon him to state the essential ultimate facts

> upon which his cause of action rested, and not content himself with charging generally that what was done was 'colorable,' a 'fraud,' a 'breach of trust,' and a scheme by which Blair and Taylor were to get the stock without paying for it. These are allegations of legal conclusions merely which a demurrer does not admit."

These cases are civil cases. The rule in criminal and quasi criminal cases is even stricter.

In the case of Fox vs. Hale, *et al.*, 53 Pac. Rep., 32, an action was brought in the State Court in California against the corporation and its directors charging a fraudulent conspiracy. In deciding whether there were any proper allegations of fraud in the complaint, the Court said:

> "Fraud is a conclusion of law and when made a ground of action the fact constituting it must be stated. The law upon this matter is stated in Bliss on Code of Pleading, Section 211: 'In alleging fraud, it will not suffice to say that the party fraudulently procured, or fraudulently induced, or fraudulently did this or that, or that he committed or was guilty of fraud. The facts which constitute the fraud must be stated. Fraud is a conclusion of law.'"

In the syllabus numbered one, the Court say:

> "In charging fraud, the complaint must state the facts constituting the fraud, at least in a general way, and such facts must be alleged with sufficient distinctness to enable the adverse party to come prepared with evidence on the particular question of fraud which will be raised."

In Talbott vs. Caledonia Ins. Co., 101 Ga., 946, the Court say:

"In pleading fraud and duress, specific facts must be stated with due certainty, and where the execution of a deed is the result, the facts must be such as will avoid the deed. The facts constituting the fraud must be stated. The use of epithets, however bountifully multiplied, will not supply the state of facts. Pleadings must state facts, and not legal conclusions, and fraud is never sufficiently pleaded, except by the statement of the facts upon which the charge is based. Facts constituting the alleged fraud must be full and explicit * * *. Pleadings should state facts, not conclusions. The complaint should state specific facts that the Court may be able to charge whether the same constitute fraud."

In Anderson Transfer Co. vs. Truller, 73 Ill. Apps., 52, the Court say:

"The plea, moreover, is clearly bad; it avers fraud in general terms, and merely uses a conclusion, not averring any facts upon which that conclusion can be deduced."

Again, in Ward vs. Lunnen, 25 App. Ct. Reps., Ill., 160, the Court say:

"An allegation in general terms that the defendant fraudulently executed or fraudulently induced the plaintiff to accept it is not a sufficient allegation of fraud. The facts constituting the fraud relied on must be set forth in the declaration."

In Kerr vs. Sleman, 72 Iowa, 241, the Court say:

"The petition further states that the defendant made a false report with intent to cheat and defraud her, but wherein the same was false does not appear. She should have set out in what the falsity constituted to disprove it. The doctrine is elementary that whoever

sets up fraud must do more than allege in general and abstract terms. He must set out the specific facts in which the fraud consists."

Again, in Cohn, *et al.*, vs. Goldman, 76 N. Y., 284, the Court say:

"The complaint alleged that the defendants in concert did, by connivance, conspiracy, and combination, cheat and defraud the persons out of certain goods of a value specified. Held not facts stated, therefore not sufficient for cause of action in fraud."

16 Cyc., 231, says:

"A bill asking relief on the ground of fraud must distinctly and specifically charge the fraud. It must state the specific facts and circumstances constituting the fraud, and the facts so stated must be sufficient in themselves to show that the conduct complained of was fraudulent. General charges of fraud, or that acts were fraudulently committed, are of no avail, unaccompanied by statements of specific facts amounting to fraud."

A complaint alleging a cause of action based on fraud but not averring the facts constituting the fraud is demurrable.—Cosgrove vs. Fiske, 90 Cal., 75.

In Newbank vs. Klein, 112 Wisc., 287, the Court say:

"A mere allegation in a pleading that a person fraudulently did a particular thing does not open the way to prove fraud where the doing of the thing alleged does not necessarily constitute fraud. In pleading fraud either at law or in equity, facts not conclusions must be stated. The mere allegation as in the answer in this case that the party charged with fraud fraudulently represented, followed by a statement of the representations complained of which does not of

itself constitute fraud will not do. It must be made to appear by the facts alleged independent of mere conclusions that if the allegations are true, fraud has been committed."

In Fogg vs. Blair, 139 U. S., *supra,* Mr. Justice Harlan stated:

"Has the plaintiff impugned the good faith of the transaction? It was incumbent upon him to state the essential ultimate facts upon which the cause of action, and not content himself with charging generally that which was done was a fraud or a breach of trust."

And in Cade vs. Camp, etc., 27 Wash., 218, the Court say:

"So far as the allegations in the complaint of fraud is concerned, it is not definite enough to be maintained nor words pleaded but pleaded to support the conclusion pleaded. It is a mere general averment without setting forth any facts upon which the averment is predicated."

And also in Crowly vs. Hicks, 98 Wis., 566, the Court say:

"In pleading fraud it is not sufficient to allege the mere conclusion that the party acted fraudulently but the facts from which such conclusion is drawn must be stated."

And as said by this Court in Evans vs. United States, 153 U. S., 584:

"Even in the case of misdemeanors the indictment must be free from all ambiguity and leave no doubt in the mind of the accused or of the Court of the exact offense intended to be charged."

In cases kindred to the case at bar, and also in cases under this statute, the Federal Courts have adopted with approval the rule of construction we have here referred to. We refer to the case of United States vs. Post, 113 Fed. Rep., 852, which was an indictment under Section 5480, which alleged that the defendant had devised a scheme to defraud by pretending and advertising that she could cure diseases and poverty by mental science, etc. The Court, speaking of the form of the indictment, said:

> "The well established principle of criminal pleading which requires direct, positive and affirmative allegation is too well established to require extended consideration. Nothing in a criminal case can be charged by implication, intendment or recital, but every fact necessary to constitute the crime must be directly and affirmatively alleged. In this case, as in all offenses of this character, the intention of the defendant is the very gist and substance of the fraud which must necessarily be embodied in the scheme or artifice as a foundation for the violation of the law. Without such fraudulent intent, it would be impossible to devise a scheme to defraud. The very term necessarily implies a fraudulent intention from the inception of the scheme, and no indictment that does not negative the good faith and honest belief of the defendant can be sufficient. No matter how fraudulent or criminal any act or series of acts may appear by implication, or how repugnant to the enlightened intelligence or morality it may appear by a general statement of a case, no person should be put upon trial upon issues not clearly alleged. In this case the dishonest and fraudulent intentions of the defendant would be the question to be passed upon by the jury, and should be clearly stated. Durland vs. United States, 161 U. S., 306; 16 Sup. Ct., 508; 40 L. Ed., 709. The only direct and positive assertion of defendant's acts made in the indictment in this connection is that she requested and solicited people to open correspondence.

> There is no direct assertion of her intention further than by implication that she was 'fraudulently intending to get possession of such money and convert the same to her own use, without rendering to persons sending the same any service or thing of value therefor.' The use of the word, 'fraudulently,' is not alone a sufficient allegation of a fraudulent intent. The circumstances and declared intention must show the act to be such."

This case of United States vs. Post is referred to and quoted in the case of Erbaugh vs. United States, 173 Fed., 435, and again in Etheredge vs. United States, 186 Fed., 437. In the latter case the Court, after referring to the Post case, say:

> "The indictment must show clearly that the person charged as devised or intended to devise a scheme or artifice to defraud, that he intended to effect it by opening or intending to open correspondence with some other persons through the Post Office establishment or by inciting some other persons to open communication with him, and that in executing the scheme charged in the indictment and accused has either deposited a letter or package in the Post Office, or has taken and received one therefrom. As said in Miller vs. United States, 133 Fed. Rep., 341, 'When one is indicted for a serious offense, the presumption is that he is not guilty, and if he is ignorant of the supposed facts upon which the charge against him is founded he is unable to procure and present the evidence in his defense—indeed he is deprived of all reasonable opportunity to defend—unless the indictment clearly discloses all the facts upon which the charge of the commission of the offense is based. It must set forth the facts which the pleader claims constituted the alleged transgression, so distinctly as to advise the accused of that charge which he is to meet so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him

> to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that he may, upon an examination of the indictment, be able to determine whether or not under the law the facts there stated are sufficient to support a conviction.' "

In United States vs. Louisville & N. R. Railroad Co., 165 Fed. Rep., the defendant was indicted under Act of March 3, 1905, entitled "An Act to enable the Secretary of Agriculture to establish and maintain quarantine districts to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes." The Court held the indictment bad, upon the authority of United States vs. Post, 113 Fed. Rep., 854, and after citing numerous authorities to sustain that proposition, they say:

> "The obvious reason for this rule is that the accused is entitled to have stated in the indictment fully and precisely all the elements of the offense charged against him, in order that he may know what he is to meet by testimony, and whether the facts charged constitute a crime, and if so, that the judgment in the case may afford a bar to any further prosecution for the same offense."

In this case the indictment failed to state that certain regulations which could be punished by law were adopted and promulgated by the Secretary of Agriculture.

In the case of United States vs. Sixty-eight Cases of Syrup, 172 Fed. Rep., 782, the same being a proceeding under the Pure Food Act, the Court, in holding the libel bad in that it failed to state a cause of action, said:

> "The demurrer of the respondent to the libel admits all the facts well pleaded in the libel, and while it is stated by the libel that the boxes and bottles do not

> contain a blend of maple syrup, the following statement in the libel that the contents consist of a mixture or compound largely of refined cane sugar flavored with an extract of maple syrup renders the previous negation of a blend of maple syrup negative as a fact stated, but leaves it as a mere conclusion of the pleader that is not admitted by the demurrer."

Again, in the case of United States vs. 650 Cases of Tomato Catsup, 166 Fed. Rep., 773, the Court, referring to the contents of the libel, says:

> "The Act in question imposes criminal penalties and the forfeiture of the offending article. Where the charge is a misbranding, it is essential that the libel should set forth the branding and facts inconsistent therewith."

Again, in the case of Neve-McCord Mercantile Co. vs. United States, 182 Fed. Rep., 46, the Circuit Court of Appeals, speaking through Sanborn, Justice, said:

> "Nor may an averment that a defendant intended that a label should be understood by the public to mean the opposite of its ordinary and accepted interpretation make its use a misbranding or constitute a violation of the law. The truth is that when the averments of this count are read and construed together they clearly disclose the facts that the fluid made and sold by the defendant was not a pure lemon extract or a pure lemon flavor or any imitation thereof; that the defendant never placed any label or mark upon it which indicated that it was, or which could mislead a purchaser, but that by its declaration through the label, that it was a flavor of lemon and citrol, it clearly notified all purchasers that the fluid was neither a pure lemon extract nor a pure lemon flavor. There is no averment of any facts which disclose any adulteration of this flavor of lemon and citrol, and the averment

fails to state sufficient facts to constitute a violation of the law. United States vs. Hess, 124 U. S., 183; United States vs. Post., 113 Fed. Rep., 852."

With these authorities before us, let us examine the libels and see if in the four corners thereof there is any allegation of any fraudulent act on the part of the defendant. We think that an examination of the libels will show not only is there no fraudulent statement of any facts that would bring the defendant within the Sherley Amendment, but that the very wording of the libels negatives the idea that there is any such act or facts that can be charged to the defendant. Let us briefly take each statement separately.

"Effective as a preventative for pneumonia."

Why fraudulent? Because "it conveys the impression to purchasers that said article of drug can be used as an effective preventative for pneumonia, whereas in truth and in fact said article of drug could not be so used"? Wherein does this show any fraudulent act on the part of the defendant? The fact that he made a statement that conveyed an impression to a purchaser that he means a certain thing when in truth and in fact he does not mean that thing? If the libels mean this, and we submit that they really do not mean that much, how could it be said for a moment that there was stated in the libels anywhere any fraudulent act on the part of the defendant in regard to the statement, "effective as a preventative for pneumonia"?

We have seen that this statement in the libels does not even make an issue of falsity. How can it be said that it raises an issue of fraudulency? The use of the word, "fraudulent," can not aid the pleader. The question the Court has to decide is whether or not the statement made by the defendant, "effective as a preventative for pneu-

monia," is a fraudulent statement because it conveys the impression to purchasers that the said article of drug can be used as an effective preventive for pneumonia, when in truth and in fact said article of drug could not be so used. Wherein is there any fraud in this? Wherein in this statement do we find any facts, as required by the authorities, that lay a basis for a conviction of the defendant or its goods by reason of a fraudulent statement made by the defendant? In or by this averment where do we find any notice to the defendant of any facts that are relied upon by the Government to prove that the defendant has made a fraudulent statement? It is submitted that nowhere within the four corners of the libel, as far as the statement, "effective as a preventative for pneumonia," is concerned, is there any allegation of a fraudulent act on the part of the defendant.

When we come to the other statement, "We know it has cured and that it has and will cure tuberculosis," not only does the libel not allege any fraudulent act on the part of the defendant, but it negatives all idea of fraud because it puts at issue only the question of whether or not there is known to the medical world a drug that will cure tuberculosis.

The defendant says, speaking of his drug, that it has cured and will cure tuberculosis.

The Government says, "Not that you make this statement wilfully and fraudulently with intent to deceive anyone, not that in making this statement you are dishonest and guilty of moral turpitude, because you yourself know that what you state is not only untrue, but a wilful perversion of facts on your part, but the statement is untrue because, forsooth, opinion is that there is no drug that will cure tuberculosis." No matter how honest the defendant may be in his belief, no matter how well founded from the

defendant's view point may be his belief, if the Government can establish by a preponderance of evidence that in the opinion of medical men there is no drug or substance that will cure tuberculosis, then, according to this libel, and according to the contention of the Government, this defendant is guilty of a criminal offense, and not only can his goods be seized and destroyed, as they have been seized for the purpose of destruction in this case, but this defendant and the officers of the corporation representing it could be haled into court as criminals, and no matter how strong may be the belief of the defendant, no matter how honest his conviction in regard to the substance as being effective as a preventive for pneumonia, this defendant is a criminal and the officers of the company could be haled into the criminal court to answer this charge.

If this libel states a ground for the seizure of these goods, then the Sherley Amendment, by the use of the word, "fraudulent," has added nothing to the Pure Food Law, the word "fraudulent" in the law means nothing, is surplusage, and the only question involved is the falsity of the statement.

It is respectfully submitted that a Court can not strike down the law in this way, and that the law, as written, uses the words "False and fraudulent"; that the law, as written, omits the word "misleading," and therefore, before these defendants can be deprived of their property in a proceeding of this kind, the libel, which is the basis of the proceeding, must state facts which show a violation of the Sherley Amendment must state facts that show not only that the statements are false, but that they are also fraudulent.

From these authorities it is respectfully submitted that if this statute is to be given any validity at all, the court must hold that the words, "false and fraudulent," mean

false in fact and fraudulent in fact, and that there must be allegations in the libel stating wherein the said drug is false and fraudulent. But, as indicated by the libels, it would seem that the government contend that it was the intention of Congress to enter into the doubtful domain of speculation and opinion, and the Congress intended by the Sherley Amendment not only to make an issue of the mere opinion of persons as to the curative and therapeutic effect of a drug, but also to prevent a proprietor or manufacturer from stating his beliefs as to the effect of a drug manufactured by him. Of course, any allegations or any information that attempts to punish such beliefs, or to raise an issue of opinion, states no offense, and even if the statute was one that would warrant an information or libel, such information or libel would be bad.

FIFTH.

In this brief we have considered not only the constitutional questions involved, which questions we regard as of paramount importance, but we have also considered all questions raised by the demurrer, and in bringing the several writs of error to this court, we take it as not disputed that this court has full power and authority to hear not only the constitutional questions raised by the demurrer and the assignments of error, but also all questions raised by the demurrer and the assignments of error, because this court has said that where a case comes before it directly from the District Court, that the whole case, and not merely the constitutional questions, or questions that give the court jurisdiction, are involved and may be considered by this court. It is only necessary to mention the case of Field vs. Barber Asphalt Paving Co., 194 U. S., 618, and the authorities cited.

In that case, where an attempt was made to limit the jurisdiction of this court to consider only the constitutional grounds raised, this court said:

> "The contention is that the prayer of the complainant on the constitutional grounds having been denied, the appeal of the respondent should have been to the Circuit Court of Appeals. But we can not agree to this view. There was no cross bill filed in the case, and none was required. The bill of complaint contained allegations sufficient to make a case of alleged violation of constitutional rights. It is well settled that in such cases the entire case may be brought to this Court by the appeal. In Holder vs. Aultman, M. & Co., 169 U. S., 81-88, 42 L. Ed., 669-671, 18 Sup. Ct. Rep., 269, discussing the Act of March, 1891, Mr. Justice Gray said:
>
> " 'Upon such a writ of error, differing in these respects from a writ of error to the highest court of a State, the jurisdiction of this Court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this Court is not limited to the constitutional question, but includes the whole case. Whitten vs. Tomlinson, 169 U. S., 231, 238, 40 L. Ed., 406, 410, 16 Supt. Ct. Rep., 297; Penn. Mut. Ins. Co. vs. Austin, 168 U. S., 685, 42 L. Ed., 626, 18 Supt. Ct. Rep., 223.' Loeb vs. Columbia Twp., 179 U. S., 472, 45 L. Ed., 280, 21 Sup. Ct. Rep., 174.
>
> See also Chappell vs. United States, 160 U. S., 499-509, 40 L. Ed. 510-513, 16 Supt. Ct. Rep., 397; Horner vs. United States, 143 U. S., 570-577, 36 L. Ed. 266-269, 12 Sup. Ct. Rep., 522."

The attempt on the part of the government to amend the libels would hardly in any way change the questions raised here. The idea seems to have been that if it was alleged that the plaintiff in error knew of the facts alleged in the

libel, that that was sufficient to make the statements false and fraudulent as to the plaintiff in error, but as we have shown that there is no allegation of fact in the libels from which it can be inferred that they are false and fraudulent, there is not pointed out to us any question of fact upon which we could join issue, and the fact that the plaintiff in error knew of the allegations which are mere conclusions of law, or which attempt to raise an issue of opinion, would not in any way aid the pleader.

It is, therefore, respectfully submitted that the several judgments of the District Court should be reversed, and the cause remanded, with instructions and directions to sustain the demurrer to the libels, and dismiss the petition and discharge the drugs seized from the unlawful seizure.

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# INDEX.

APPENDIX.



CITATIONS.

# In the Supreme Court of the United States.

OCTOBER TERM, 1915.

SEVEN CASES (MORE OR LESS), EACH CONTAINING TWELVE BOTTLES OF ECKMAN'S ALTERATIVE, ECKMAN MANUFACTURING COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES OF AMERICA. — No. 50.

SIX CASES (MORE OR LESS), EACH CONTAINING TWELVE BOTTLES OF ECKMAN'S ALTERATIVE, ECKMAN MANUFACTURING COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES OF AMERICA. — No. 51.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

These are companion cases in which the facts are the same and the questions presented identical. Accordingly they are considered in one brief and as if one case.

A libel was filed by the United States in the District Court for the District of Nebraska, under the Food and Drugs Act of June 30, 1906 (c. 3915, 34 Stat. 768), as amended by the Sherley Amendment of August 23, 1912 (c. 352, 37 Stat. 416), to condemn, because misbranded, a number of cases of a drug known as Eckman's Alterative, shipped, in November, 1912, from Chicago, Ill., to Omaha, Nebr., and there seized in unsold and unbroken original packages, which were in the possession of and being offered for sale by the Richardson Drug Company in the one case and Bruce & Company in the other.

The Eckman Manufacturing Company, without filing any pleading claiming the property seized or praying to be made a party, interposed a demurrer to the libel. The demurrer was overruled and judgment of condemnation was entered. The judgment is brought by writ of error direct to this court for review upon the ground that the constitutionality of the Sherley Amendment is involved.

STATEMENT OF FACTS.

The libel alleged that each case of the drug was labeled,

> Eckman's Alterative. Guaranteed by the makers to conform to all the provisions of the Food & Drugs Act—Serial No. 1242. Prepared only by Eckman Manufacturing Co., Laboratory, Philadelphia, Pa.—One doz. Eckman's Alterative. (R. 1.)

and contained twelve bottles, each in a package containing a printed circular bearing the following statements,

> Effective as a preventative for Pneumonia. We know it has cured and that it has and will cure Tuberculosis.

and that each of the bottles was labeled as follows:

> Eckman's Alterative,—contains twelve per cent. of alcohol by weight, or fourteen per cent. by volume—used as a solvent. For all throat and lung diseases including Bronchitis, Bronchial Catarrh, Asthma, Hay Fever, Coughs and Colds, and Catarrh of the Stomach and Bowels, and Tuberculosis (Consumption) . . . two dollars a bottle. Prepaid [prepared] only by Eckman Mfg. Co. Laboratory Philadelphia, Penna., U. S. A. (R. 2.)

The libel further alleged that:

> the statement "effective as a preventative for pneumonia" appearing on the circular enclosed, as aforesaid, in the package containing each bottle, is false, fraudulent and misleading in this, to wit, that it conveys the impression to purchasers that said article of drugs can be used as an effective preventative for pneumonia, whereas, in truth and in fact said article of drugs could not be so used; and the statement "We know it has cured and that it has and will cure tuberculosis", appearing on the aforesaid circular, enclosed as aforesaid in each package containing said articles of drugs, is false, fraudulent and misleading in this, to wit, that it conveys the impression to

> purchasers that said article of drugs will cure tuberculosis, or consumption, whereas, in truth and in fact said article of drugs would not cure tuberculosis, or consumption, there being no medicinal substance nor mixture of substances known at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption. (R. 2.)

## ARGUMENT.

The demurrer attacked the sufficiency of the libel and the constitutionality of the Sherley Amendment. The questions presented are as follows:

I. Does the Sherley Amendment apply to representations in a circular inclosed within the original unbroken package?

II. If so, is the act unconstitutional as (1) a regulation of intrastate, instead of interstate, commerce; or (2) as a regulation of matters of opinion; or (3) as violative of the fifth or sixth amendment to the Constitution?

III. Do the facts alleged in the libel support the judgment of condemnation?

## I.

### THE SHERLEY AMENDMENT APPLIES TO STATEMENTS IN A CIRCULAR CONTAINED WITHIN THE ORIGINAL UNBROKEN PACKAGE.

The Sherley Amendment, now section 8, paragraph Third, of the Food and Drugs Act, provides:

> That for the purposes of this act an article shall also be deemed to be misbranded: In case of drugs:
>
> * * * * *

> Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

This amendment was passed to remedy the failure of the original act to reach fraudulent representations regarding the therapeutic value of drugs, a defect revealed by the decision of this court in *United States* v. *Johnson*, 221 U. S. 488. (Vol. 48, Cong. Rec., part 12, p. 675.)

The defect in the original act was considered of so great importance that President Taft transmitted a special message to Congress upon the subject, in which he said:

> The Supreme Court has held in a recent decision (*United States* v. *O. A. Johnson*, opinion May 29, 1911) that the food and drugs act does not cover the knowingly false labeling of nostrums as to curative effect or physiological action, and that inquiry under this salutary statute does not by its terms extend in any case to the inefficacy of medicines to work the cures claimed for them on the labels. It follows that, without fear of punishment under the law, unscrupulous persons, knowing the medicines to have no curative or remedial value for the diseases for which they indicate them, may ship in interstate commerce medicines composed of substances possessing any slight physiological action and labeled as cures for diseases which, in the present state of science, are recognized as incurable.

An evil which menaces the general health of the people strikes at the life of the Nation. In my opinion, the sale of dangerously adulterated drugs, or the sale of drugs under knowingly false claims as to their effect in disease, constitutes such an evil and warrants me in calling the matter to the attention of the Congress.

Fraudulent misrepresentations of the curative value of nostrums not only operate to defraud purchasers, but are a distinct menace to the public health. There are none so credulous as sufferers from disease. The need is urgent for legislation which will prevent the raising of false hopes of speedy cures of serious ailments by misstatements of fact as to worthless mixtures on which the sick will rely while their diseases progress unchecked.

At the time the food and drugs act was passed there were current in commerce literally thousands of dangerous frauds labeled as cures for every case of epilepsy, sure cures for consumption and all lung diseases, cures for all kidney, liver and malarial troubles, cures for diabetes, cures for tumor and cancer, cures for all forms of heart disease; in fact, cures for all the ills known at the present day. The labels of many of these so-called cures indicated their use for diseases of children. They were not only utterly useless in the treatment of disease, but in many cases were positively injurious. If a tithe of these statements had been true, no one with access to the remedies which bore them need have died from any cause other than accident or old age. Unfortunately, the statements

> were not true. The shameful fact is that those who deal in such preparations know they are deceiving credulous and ignorant unfortunates who suffer from some of the gravest ills to which the flesh of this day is subject. No physician of standing in his profession, no matter to what school of medicine he may belong, entertains the slightest idea that any of these preparations will work the wonders promised on the labels.
>
> * * * * *
>
> Of course, as pointed out by the Supreme Court, any attempt to legislate against mere expressions of opinion would be abortive; nevertheless, if knowingly false misstatements of fact as to the effect of the preparations be provided against, the greater part of the evil will be subject to control. (Vol. 47, Cong. Rec., part 3, p. 2434.)

In response to this message, which clearly pointed out the evil to be remedied, the Sherley Amendment was enacted.

> Another guide to the meaning of a statute is found in the evil which it is designed to remedy. (*Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 463.)

The language of the amendment is broader than the original act. The latter condemned any article "the package or label of which shall bear any statement," etc., that was "false *or misleading.*" The amendment extends the act, not only by specifically mentioning "false *and fraudulent*" statements regarding the curative or therapeutic effect of drugs,

but also by adding the words "*or contain,*" so that the amended act becomes operative upon any drug if its package or label shall "bear *or contain*" any statement, etc., regarding its therapeutic effect, which is false *and fraudulent.*

"Contain" means "to have for its contents; hold; enclose." (New Standard Dictionary.) The strict letter of the amendment, therefore, forbids the transportation in interstate commerce of any drug, if the package holding it shall "contain" any false and fraudulent statements like those in question. Apter words could not be found to express the intent to include statements printed upon circulars *contained* in the package and this court will give effect to this purpose.

> If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court. *Lake County* v. *Rollins,* 130 U. S. 662, 670. (*United States* v. *Lexington Mill Co.,* 232 U. S. 399, 409, and cases cited.)
>
> The purpose of the law is the ever insistent consideration in its interpretation. (*United States* v. *Antikamnia Co.,* 231 U. S. 654, 667.)
>
> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. (*United States* v. *Goldenberg,* 168 U. S. 95, 102.)

> * * * but where the language of the act is unambiguous and explicit, courts are bound to seek for the intention of the legislature in the words of the act itself, and they are not at liberty to suppose that the legislature intended any thing different from what their language imports. Potter's Dwarris, 146. (*Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 656, 663.)

This court, in *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18, quote with approval the following language of Mr. Justice Story:

> But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. (*United States* v. *Winn*, 3 Sumn. 209, 211.)

The interpretation asserted by Eckman Manufacturing Company gives, contrary to elementary rules of statutory construction, no effect to the important words "or contain," which Congress added, and the act is read as if only the word "bear" of the original act appeared in the amendment.

> * * * words which have a meaning are not to be entirely disregarded in construing a statute. (*Postmaster General* v. *Early*, 12 Wheat. 136, 148.)
>
> Every word or clause used in a statute is presumed to have a meaning of its own,

> independent of other clauses, * * * (*Murphy* v. *Utter*, 186 U. S. 95, 111.)
>
> Congress is not to be presumed to have used words for no purpose. (*Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 58.)

The legislative history of the amendment clearly shows that it was the purpose of Congress to include such circulars within the scope of the amendment.

> Mr. MOORE of Pennsylvania. Mr. Speaker, I would like to inquire of the gentleman from Kentucky who introduced this bill, which is a very important measure and one that ought to be passed in corrected form, whether he will agree to an amendment which would cover the printed matter inside the packages or the label? The bill seems to be defective in that respect. * * * It appears that there are cases where the defendant might, under the decision of the Supreme Court and in spite of the amendment suggested by the gentleman from Tennessee, avoid the penalty provided the false statements are not on the outside cover of the package. It is known that in cases of nostrums and patent medicines the statement in regard to the ingredients or therapeutic properties of the article is frequently on the inside of the cover of the package or bottle. I would suggest to the gentleman that it might be well to substitute the words "the label of which shall bear, or the package of which shall bear or contain." The addition of the words "or contain" would be sufficient.

Mr. SHERLEY. * * * The matter that the gentleman brings to the attention of the House had been also spoken of to me by the gentleman from Illinois [Mr. Mann], and while I think a proper construction of the act would perhaps cover the matter, still I see no reason why we should not make the assurance doubly sure. I would have no objection to such amendments.

* * * * *

Mr. SHERLEY. Mr. Speaker, I offer as an amendment, on line 8, page 1, after the word "bear," the words "or contain." Also, on line 22, page 2, after the word "bear," the words "or contain."

The SPEAKER. The question is on agreeing to the amendments.

The question was taken, and the amendments were agreed to. (48 Cong. Rec., part 11, pp. 11, 322.)

The letter of the amendment, its spirit and that of the entire act, the evil to be remedied, and the legislative history of the amendment, all show indubitably that Congress intended to exclude from interstate commerce all articles accompanied by false and fraudulent representations of the kind in question, whether printed on the exterior label or upon circulars inclosed within the original package.

## II.

### THE SHERLEY AMENDMENT IS A CONSTITUTIONAL REGULATION OF INTERSTATE COMMERCE.

#### 1. REGULATION OF INTERSTATE COMMERCE.

An act forbidding the transportation of a drug in interstate commerce, when a false and fraudulent statement concerning same is contained within the original package, does not cease to be an act to regulate interstate commerce and become a regulation of intrastate commerce merely because such statement may not be seen by the purchaser until after the termination of the interstate movement. To so hold would nullify Congress's power over a large part of interstate commerce and make evasion of protective laws easy by merely providing an additional wrapper for articles while moving in interstate commerce.

If the statement is of such character that Congress could exclude from interstate commerce an article bearing it upon the outside wrapper, a question discussed below, it is inconceivable that mere change of the position of the statement could destroy Congress's control over the article and render the Federal Legislature powerless to prevent such fraudulent and immoral use of instrumentalities of interstate commerce. We add, in the words of this court, that "it is quite incredible that such an unsubstantial distinction should find a place in constitutional law." (*Davis* v. *Mills*, 194 U. S. 451, 456.)

The very nature of the power of Congress over interstate commerce and the long line of decisions of this

court construing same seem conclusively to preclude any such claim.

> This power, like all others vested in Congress, is *complete in itself*, may be exercised *to its utmost extent*, and acknowledges *no limitations other than are prescribed in the Constitution*. (*Gibbons* v. *Ogden*, 9 Wheat. 1, 196, as italicized and quoted in the *Lottery Case*, 188 U. S. 321, 347.)
>
> * * * in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed. (*Lottery Case*, 188 U. S. 321, 353.)
>
> The sound construction of the Constitution, this court has said, "must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 4 Wheat., 421 (*Lottery Case*, 188 U. S. 321, 355). See also *Hoke* v. *United States*, 227 U. S. 308; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 176; *Legal Tender Cases*, 12 Wall. 457; *United States* v. *Patten*, 226 U. S. 525; *Loewe* v. *Lawlor*, 208 U. S. 274.

This power extends beyond commerce itself to all instrumentalities of commerce.

> This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. (*Second Employers' Liability Cases*, 223 U. S. 1, 47.)

The precise question involved, it is submitted, has already been decided by this court.

> That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the States and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce, and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution, it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect.
>
> * * * * *
>
> Limiting the requirements of the act as to adulteration and misbranding simply to the

> outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed. (*McDermott* v. *Wisconsin*, 228 U. S. 115, 128, 130–131.)

It is contended that the amendment is an attempted exercise of police powers, "which have been left with the States and can not be assumed by the National Government." (Brief, p. 23.) This has been the claim in all similar cases.

> The Pure Food and Drugs Act (June 30, 1906, 34 Stat. 768, c. 3915) is a conspicuous instance. In all of the instances a clash of national legislation with the power of the States was urged, *and in all rejected.* (*Hoke* v. *United States*, 227 U. S. 308, 322.) [Italics ours.]

The contention may be answered in the words of this court:

> The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several States"; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, *and the means may have the quality of police regulations. Gloucester Ferry Co.* v.

> *Pennsylvania*, 114 U. S. 196, 215; Cooley, Constitutional Limitations, 7th ed. 856. (*Hoke* v. *United States*, 227 U. S. 308, 323.) [Italics ours.]

It results, therefore, that the Sherley Amendment is a regulation of interstate commerce and valid, if Congress is not forbidden by other provisions of the Constitution to regulate the transportation, in interstate commerce, of articles accompanied by statements of the character described in the act.

The exercise of this power is attacked upon the ground that the amendment is an attempt to regulate matters of opinion, and therefore violative of the fifth amendment to the Constitution.

**2. THE SHERLEY AMENDMENT IS NOT A REGULATION OF MATTERS OF OPINION.**

The amendment provides that a drug shall be deemed to be misbranded:

> If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, *which is false and fraudulent.*

To constitute a violation of this law, therefore, the statement must be not only false but *fraudulent.*

The word "fraudulent" has a definite and precise meaning in both civil and criminal law. To be fraudulent, the representation must not only be false, but "not actually believed by the defendant, on reasonable grounds, to be true" and must have been "made with intent that it should be acted on."

(*Southern Development Co.* v. *Silva*, 125 U. S. 247, 250.)

That this word, used in its common law sense, expressed the purpose of Congress is shown by the legislative history of the amendment.

> The expression "false and fraudulent" has a well-defined meaning in the criminal law. The word "false," of course, means untruthfulness in its ordinary sense. "Fraudulent," as used in a criminal statute and as a material word in an allegation in an indictment charging that a person has fraudulently represented certain things, is given the meaning which attaches to the word in common usage; that is, a deliberately planned purpose and intent to deceive.
>
> * * * * *
>
> The proposed paragraph by using the word "fraudulent" will require the Government, in any prosecution thereunder, to prove a state of facts regarding the properties of the drug sold which imply a knowledge on the part of the manufacturer that the drug will not do the thing that is asserted on the label. (House Committee Report, 48 Cong. Rec., part 12, Appendix, p. 676.)

The amendment, therefore, by condemning only statements which are false *and fraudulent*, does not purport to regulate statements of opinion. A representation, whether expressed in the form of an affirmation of fact or of opinion, can not be an expression of opinion if the maker does not himself

believe the statement to be true, and, as a matter of fact, hold such opinion, but, on the contrary, knows that it is false and makes same with the intention of deceiving. To be an opinion, it must express what he believes, and not a deliberate falsehood. This case presents not a question "to be determined by the state of public opinion, or of scientific opinion," as claimed by plaintiff in error (Brief, p. 31), but one to be determined by the offender's own state of mind. Whether the maker himself believes the statement to be true is a question of fact for the determination of the jury.

Questions of like character have been held repeatedly to be questions of fact. For example, value is a matter of opinion (*Chaffee & Co.* v. *United States*, 18 Wall. 516, 542), and an honest expression of opinion with respect thereto would not be held unlawful, but where a false and fraudulent declaration of market value is made by one "swearing falsely and knowing it," for the purpose of defrauding the Government of revenue (*Cliquot's Champagne*, 3 Wall. 114, syllabus), the offender may be punished and his goods forfeited.

> It has been suggested at the bar, that fraud cannot be predicated of belief, but only of facts. But this distinction is quite too subtle and refined. The affirmation of belief is an affirmation of a fact that is, of the fact of belief; and if it is fraudulently made to mislead or cheat another, to abuse his confidence, or to blind his judgment, it is in law and morals

just as reprehensible, as if any other fact were affirmed for the like purpose. The law looks not to the nature of the fact averred but to the object and design of the affirmation. (Mr. Justice Story in *Stebbins* v. *Eddy*, 4 Mason, 414, 423.)

That a fraudulent recommendation (and a recommendation known at the time to be untrue would be deemed fraudulent) would subject the person giving it to damages sustained by the person trusting to it, seems now to be generally admitted. The case of *Pasley* v. *Freeman*, reported in 3 Term. Rep., recognizes and establishes this principle. Indeed, if an act, in itself immoral, in its consequences injurious to another, performed for the purpose of effecting that injury, be not cognizable and punishable by our laws, our system of jurisprudence is more defective than has hitherto been supposed. (Marshall, C. J., in *Russell* v. *Clarke's Executors*, 7 Cranch, 69, 94.)

A representation that a worthless medicine, in the manufacture of which plaintiff was induced to invest, is a sure cure for a certain malady, is not a mere expression of opinion, but is a misrepresentation of fact, and is actionable. (Syllabus, headnote 2, *McDonald* v. *Smith*, 139 Mich. 211.)

If a person publicly practicing as a physician, on being called upon to attend a sick woman, prescribes, with foolhardy presumption or gross recklessness, a course of treatment which causes her death, he may be found guilty of manslaughter, although he acted with

her consent, and with no evil intent. (Syllabus, headnote 1, *Commonwealth* v. *Franklin Pierce*, 138 Mass. 165.)

There are some cases, however, in which even a false assertion of opinion will amount to a fraud, the reason being that, under the circumstances, the other party has a right to rely upon it without bringing his own judgment to bear. Such is the case where one is purchasing goods, the value of which can only be known to experts, and is relying upon the vendor, who is a dealer in such goods, to give him accurate information concerning them. (Cooley on Torts, 3d ed., p. 925.)

It is material to observe that it is often fallaciously assumed that a statement of opinion can not involve a statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. (Bowen, Lord Justice, in *Smith* v. *Land & House Prop. Corp.*, L. R. 28 Ch. Div., 7, 15.)

In *Hedin* v. *Minneapolis, etc., Institute* (62 Minn. 146, 149) the defendant was sued for falsely representing that he could and would cure plaintiff. The Supreme

Court of Minnesota affirmed a judgment for the plaintiff, and said:

> There are many cases, however, in which even a false assertion of an opinion will amount to a fraud, the reason being that, under the circumstances, the other party has a right to rely upon what is stated or represented. Thus, the liability may arise where one has or assumes to have knowledge upon a subject of which the other is ignorant, and knowingly makes false statements, on which the other relies. Where parties possess special learning or knowledge on the subject with respect to which their opinions are given, such opinions are capable of approximating to the truth. And for a false statement of them, when deception is designed and injury has followed from reliance on the opinions, an action will lie.

In *Jules* v. *State* (85 Md. 305, 311), which involved an indictment for obtaining money under false pretenses, the court said:

> What is said in this bill of particulars it appears to us is equivalent to alleging that the defendant said to the prosecutor: "I now have or am possessed of extraordinary and supernatural powers to cure you. I can and I will cure you." This is undoubtedly a representation as to an existing fact. The alleged existing fact, is that he then and there had the supernatural and extraordinary power to cure in the manner he claimed.

In *Regina* v. *Giles* (10 Cox's Criminal Cases, 44, 48), the defendant was indicted for falsely pretending he could and would bring prosecutrix's husband back. In affirming the judgment of conviction, Erle, C. J., said:

> Now, the pretence of power, whether moral, physical, or supernatural, made with the intent to obtain money, is within the mischief of the law, and sufficient to constitute an offence within the language of the statute.
>
> As with intention, so with opinion; the question whether a man does or does not entertain a particular opinion is a question of fact. An expression of opinion not honestly entertained, and intended to be acted upon, can not be regarded otherwise than as a fraud. (Clerk and Lindsell on Torts, 6th ed., p. 569.)
>
> Asserting opinion or belief is an assertion o the fact of belief, and where the fact of opinion or belief is the operative element a false representation as to what that opinion is is fraudulent, provided it is made with an intention to deceive. (Street, Foundations of Legal Liability, vol. 1, p. 395.)

See also:

*Foster* v. *Swasey*, 2 Woodb. and M. 217.
*Reg.* v. *Bunce*, 1 Fos. & F. 523.
*Murray* v. *Tolman*, 162 Ill. 417.
*Scott* v. *Burnight*, 131 Ia. 507.
*Culley* v. *Jones*, 164 Ind. 168.
*Simar* v. *Canady*, 53 N. Y. 298.
*Hickey* v. *Morrell*, 102 N. Y. 454.
*French* v. *Ryan*, 104 Mich. 625.
*McDonald* v. *Smith*, 139 Mich. 211, 216.
Montg. So. Ry. v. Matthews, 77 Ala. 357, 364.
Eibel v. Von Pell, 55 N.J. Eq., 670, 672.
Birdseye v. Butterfield, 34 Wis., 52, 59.
Darling v. Stuart, 63 Vt., 570, 575.
Cruess v. Fessler, 39 Cal., 336, 338.

Mfg. Co. v. Beeshore, 59 Fed. 572, 574.
Missouri Drug Co. v. Wyman, 129 Fed. 623, 628.
Walters v. Rock, 18 N.D., 45, 49.
Yates v. French, 41 Conn., 142, 153.

Pomeroy, Equity Jurisprudence, sec. 878.
*State* v. *Board of Med. Exmrs.*, 34 Minn. 391.
*Durland* v. *United States*, 161 U. S. 306, 313.
*Evans* v. *United States*, 153 U. S. 584, 592.
*Public Clearing House* v. *Coyne*, 194 U. S. 497, 516.
*Bowen* v. *The State*, 9 Baxter (Tenn.), 45.

The question involved in the instant case is not one of common law liability, nor merely of the construction of a statute or of an indictment, but of the power of Congress to pass the Act. In the case of *United States* v. *Johnson* (221 U. S. 488), this court expressly stated that the constitutional question was not considered and that the interpretation of the statute was the only question passed upon, saying—

> We shall say nothing as to the limits of constitutional power, and but a word as to what Congress was likely to attempt. (P. 498.)

Furthermore, the words to be interpreted in the *Johnson* case were "false *or misleading*," which, as we have shown, are very different from the words "false *and fraudulent*," involved in this case.

Likewise, in the case of *School of Magnetic Healing* v. *McAnnulty* (187 U. S. 94), the question involved was not the power of Congress to enact the statute, but the ascertainment of the authority of the Postmaster General under the statute.

After a careful search no case has been found which denies the power of Congress or of a State legislature to enact a law of the character of the Sherley Amendment, and the Government maintains that both upon principle and authority Congress has the power.

The case of *United States* v. *American Laboratories* (222 Fed. 104), apparently the only reported case involving the constitutionality of the Sherley Amendment, holds that its enactment was within the power of Congress.

3. THE ACT IS NOT VIOLATIVE OF THE FIFTH OR SIXTH AMENDMENT.

The Eckman Manufacturing Company contends that the Sherley amendment is violative of the fifth amendment to the Constitution, as depriving it of property without due process of law. In other words, it claims that the privilege of affixing upon drugs moving in interstate commerce labels, the statements of which it knows to be false and which are made for the purpose of deceiving and defrauding purchasers, ~~are~~ a constitutional right beyond the power of Congress to regulate or control. The decisions of this court negative such claim.

> It is misleading to say that men and women have rights. Their rights can not fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of June 25, 1910, and we need go no farther in the present case. (*Hoke* v. *United States*, 227 U. S. 308, 323.)
>
> It is said that it is the right and privilege of a person to move between States and that such being the right, another can not be made guilty of the crime of inducing or assisting or aiding in the exercise of it and "that the motive or intention of the passenger, either before beginning the journey, or

during or after completing it, is not a matter of interstate commerce." The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one State to another. Act of Feb. 8, 1897, 29 Stat. 512, c. 172. *United States* v. *Popper*, 98 Fed. Rep. 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. *Lottery Case*, 188 U. S. 321, 357. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise as in the instances stated and which finds further illustration in *Reid* v. *Colorado*, 187 U. S. 137. This constitutes the supreme fallacy of plaintiffs' error. It pervades and vitiates their contentions. (*Hoke* v. *United States*, 227 U. S. 308, 320–321.)

This court has said that the power over interstate commerce "is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States" (*Gibbons* v. *Ogden*, 9 Wheat. 1, 197), and that Congress's regulatory power over same may take the form of police regulations. (*Hoke* v. *United States*, 227 U. S. 308, 323.)

This court has several times held that the State may prescribe such conditions to the practice of the healing art as may be by it considered necessary or useful to secure competence in those who follow it, and that—

> It is intelligible therefore that the State should require of him a scientific training. *Dent* v. *West Virginia*, 129 U. S. 114; *Watson* v. *Maryland*, 218 U. S. 173. He like others must begin by a diagnosis. (*Collins* v. *Texas*, 223 U. S. 288, 296.)
>
> The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of *ignorance* and *incapacity* as well as of *deception and fraud*. (*Dent* v. *West Virginia*, 129 U. S. 114, 122.) [Italic ours.] See also *Hawker* v. *New York* (170 U. S. 189, 194); *Reetz* v. *Michigan* (188 U. S. 505).

If the State has the power to exclude from the practice of the healing art merely untrained and incompetent practitioners, certainly Congress has the constitutional power to outlaw the worthless and dangerous nostrums of manufacturers, not only incompetent but dishonest and corrupt, and to exclude such articles from the facilities of interstate commerce.

What constitutional provision prohibits the exercise of this power? The only one suggested in the present case, as far as the power to enact such a law is concerned, is that it attempts to deprive

the offender of his property without due process of law. Of what property is he deprived? Can it be that our Constitution by mere implication, for there is no express provision, makes so sacred the privilege of defrauding poor ignorant sufferers of our Nation, so afflicted and weakened that their helplessness and misfortune make them easy prey for unscrupulous and designing men, that Congress can not in its amplitude of power over interstate commerce exclude from its facilities articles bearing statements known to be false and made for the very purpose of deceiving?

Does Congress under this same clause have power to protect the people from unwise gambling in lottery tickets, to safeguard their morals by preventing the transportation of women for immoral purposes, to prevent the cornering of cotton or artificial raising of prices, to forbid strikes and boycotts, and to protect health by denying the facilities of interstate commerce to deleterious foods or uninspected meats; and yet is powerless to save the most unfortunate and needy of our people from the acknowledged fraudulent taking of their money and from the danger of reliance upon ineffectual and harmful nostrums scattered broadcast over the United States by means of the instrumentalities of interstate commerce?

The Government confidently asserts that the Constitution places no such limitation upon Congress's control over interstate commerce.

In the words of Mr. Justice Turney, we say:

> The main object of the law is to protect the weak against the strong, the inexperienced and unsuspecting against the experienced and vicious.
>
> There can be no rule of law caring more for the protection of the wise and cultivated than for the foolish and unlettered. (*Bowen* v. *The State*, 9 Baxter (Tenn.), 45, 50.)

It is further contended that the Act is violative of the sixth amendment to the Constitution in that the offender is not "informed of the nature and cause of the accusation."

In the first place it should be noted that the sixth amendment only applies to "criminal prosecutions" (*United States* v. *Zucker*, 161 U. S. 475, 481; *Counselman* v. *Hitchcock*, 142 U. S. 547, 563), while this is a proceeding *in rem*, a civil and not a criminal case.

> In *The Palmyra*, 12 Wheat. 1, 12, it is said that informations of seizure for forfeitures "are deemed to be civil proceedings *in rem*"; and the existence of Rule 22 of the Rules of Practice adopted by this court for the courts of the United States, in admiralty and maritime jurisdiction, on the instance side of the court, prescribing the contents of informations on seizures for a breach of the laws of the United States, shows that such seizure cases are regarded as civil suits. (*Friedenstein* v. *United States*, 125 U. S. 224, 231; *Whelan* v. *United States*, 7 Cranch, 111; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 55; *The Three*

*Friends*, 166 U. S. 1, 49; *United States* v. *300 Cases of Mapleine*, N. J. 163 (Sanborn, J.), Federal Food and Drug Decisions, 190.)

That part of the Act which makes the violation of the law a misdemeanor is severable from the provision under consideration and not before this court for construction. We fail to see, therefore, how the sixth amendment could be involved in this case. But even if it were, and the accused were before this court on indictment brought under the Act, it is submitted that the words used in the statute would sufficiently inform him "of the nature and cause of the accusation."

It has been seen that there is a misbranding of an article under the Act—

> If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

and that the word "fraudulent" bears the definite and well-known meaning given it by common law.

> These conclusions arising from a consideration of the text of the statute are rendered yet clearer by taking into view the definite legal meaning of the word "smuggling." That term had a well-understood import at common law, and in the absence of a particularized definition of its significance in the statute creating it, resort may be had to the common law for the purpose of arriving at the meaning

> of the word. *Swearingen* v. *United States*, 161 U. S. 446, 451; *United States* v. *Wong Kim Ark*, 169 U. S. 649. (*Keck* v. *United States*, 172 U. S. 434, 446.)
>
> Besides, would it not be strange to hold that a statute unaccompanied by a glossary of its terms leaves unfulfilled the legislative power? (*Lloyd* v. *Dollison*, 194 U. S. 445, 450.)

The offender is clearly informed that he violates the law if he makes any statement concerning the therapeutic effect of the drug which is false, known by him to be false, and made for the purpose of deceiving.

Here we are not discussing the sufficiency of these words when found in an indictment, but their legal sufficiency in statutes which are only expected to describe the offense in general terms.

Authorities abound which uphold laws expressed in similar general terms.

> But supposing Congress were bound, in all the cases included in the clause under consideration to define the offence, still there is nothing which restricts it to a mere logical enumeration in detail, of all the facts constituting the offence. Congress may as well define, by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term. That is certain which is, by necessary reference, made certain. (*United States* v. *Smith*, 5 Wheat. 153, 159–160; *United States* v. *Kelly*, 11 Wheat. 417; *Baker* v. *State*, 12

> Ohio St. 214, 217; *Commonwealth* v. *Exler*, 243 Pa. St. 155, 158; *State* v. *Camley*, 67 Vt. 322, 325.)

Nor can this law, under the decisions of this court, be held unconstitutional because it might throw upon men the risk of rightly determining how far they may go in making their fraudulent claims.

> But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. (*Nash* v. *United States*, 229 U. S. 373, 377; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223.)

## III.

### ALLEGATIONS OF THE LIBEL SUFFICIENT.

Reference is again made to the fact that this is not an indictment or criminal information, but a libel in a civil proceeding. It is submitted, however, that the libel in this case meets even the requirements of the rules of pleading in criminal cases, under which it is only necessary to charge the offense in such manner that—

> the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the

judgment as a bar to any subsequent prosecution for the same offence. (*United States* v. *Simmons*, 96 U. S. 360, 362.)

But only "the essential, ultimate facts upon which his cause of action" is based, and not matters of mere evidence, need be averred. (*Fogg* v. *Blair*, 139 U. S. 118, 127.)

The libel in this case describes with particularity the cases of drugs in question, specifying their contents and how labeled; alleges that they were shipped in November, 1912, by the Eckman Manufacturing Company, from its warehouse in Chicago, Ill., by way of the Chicago & North Western Railway Company, to Omaha, Nebr., where the cases in original, unbroken, and unsold packages were found upon the premises of the Richardson Drug Company, in the one case, and Bruce & Company in the other, the exact address being given, and were by them being offered for sale. The libel then alleges that such shipment was in violation of the Food and Drugs act in that the said original packages contained false and fraudulent statements, only one of which need be mentioned here, to wit: "We know it has cured and that it has and will cure tuberculosis." This statement is averred to be "false, fraudulent, and misleading in this, to wit, that it conveys the impression to purchasers that said article of drugs will cure tuberculosis, or consumption, whereas, in truth and *in fact* said article of drugs *would not cure tuberculosis, or consumption*, there being no

medicinal substance nor mixture of substances *known* at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption." R. p. 2. [Italics ours.]

It is submitted that this libel contains every essential allegation of fact necessary to constitute a violation of the law. After minutely describing the articles and furnishing a detailed history of their movements since leaving the possession of the Eckman Manufacturing Company, the libel plainly avers that the statement complained of was false and fraudulent because "in truth and *in fact* said article of drugs would not cure tuberculosis, or consumption," and that there was "no medicinal substance nor mixture of substances *known* [that is, by anybody, including those making the statement] at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption."

The statement is not in the form of an opinion, nor intended to be, but is a positive assertion of a fact, to wit, the company *knows* that *it has* and will cure tuberculosis.

It would be indulging in the nicest technicalities to say that this libel did not aver all "the essential, ultimate facts upon which his cause of action" was based, and did not apprise the violator of the law "with *reasonable certainty*, of the nature of the accusation against him," so that he might be able to "prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence."

What allegation, other than mere conclusions, could have been added? The libel may be inartificially drawn, but it is not here shown what essential ultimate fact has been omitted from its averments. It is positively alleged that the statement is false—that is, that the drug has not and will not cure tuberculosis; and also that the maker did not know that it had and would cure tuberculosis. If he did not know that the drug had and would effect such cures, and it is admitted by the demurrer that he did not, then he, the manufacturer, of whom the law requires knowledge, made affirmations of fact, in utter disregard of the truth or falsity thereof, which is clearly fraudulent.

> The court said, in substance, that a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity; that deceit may also be predicated of a vendor or lessor who makes material, untrue representations in respect to his own business or property, for the purpose of their being acted upon, and which are in fact relied upon by the purchaser or lessee, the truth of which representations the vendor or lessor is bound, and must be presumed, to know. (*Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U. S. 665, 673.)

> * * * but even in cases where the direct issue of fraud is involved, knowledge may be imputed where one wilfully closes his eyes to information within his reach. (*Wecker* v. *National Enameling Co.*, 204 U. S. 176, 185.) See also *Evans* v. *United States*, 153 U. S. 584, 593, et seq.; *Morrow* v. *Bonebrake*, 84 Kan. 724, 34 L. R. A. (N. S.) 1148; *Garvin* v. *Harrell*, 27 Okla. 373, 35 L. R. A. (N. S.) 862.

The fact that these statements, known to be false, were of the character described and placed within the package containing the medicine, are *facts* which show that they were intended to deceive and defraud the purchaser thereof. These facts are all set out in the libel and further allegations would have been legal conclusions deduced therefrom, which it is not necessary to plead.

### CONCLUSION.

The Sherley Amendment is constitutional, and the libel in this case, following the words of the statute and adding other allegations of fact, is legally sufficient to support the judgment condemning the drugs in question. The judgment of the court below, therefore, should be affirmed.

Respectfully,

E. MARVIN UNDERWOOD,
*Assistant Attorney General.*

NOVEMBER, 1915.

## APPENDIX.

### NOTICES OF JUDGMENT UNDER SHERLEY AMENDMENT.

A few illustrative cases are here given to show the character of the evils reached by the Sherley amendment.

Among the Notices of Judgment issued by the Department of Agriculture from June to October, 1915, were 44 cases under the amendment. A plea of guilty was entered or default was made in all of these cases but one, and in that case the defendant was convicted.

The cases disclose that no ailment is too slight to be noticed by the patent-medicine men, and that no disease is too serious for them to cure. A very few of these medicines are modest in their fraudulent claims and assert only that they can cure a single particular disease or class of diseases, such as consumption or female complaints. The great majority, however, are limited in their claims only by the number of words the label will contain. The following recent cases are fairly typical of the whole:

"Gray's Glycerine Tonic Compound" was recommended for all affections of the respiratory organs, including coughs, colds, whooping cough, bronchitis, laryngitis, expectoration, and tuberculosis of the lungs; for dyspepsia, nervous exhaustion and neurasthenia; for malnutrition of children; for general debility and nervousness consequent upon female diseases;

for "that very common class of cases in which there is no positive organic disease, but the patient complains that 'he does not feel well,' or 'is out of sorts.'" (N. J. 3681.)

"The Family Physician" was said to be a remedy for all diseases of the throat and lungs, including coughs, colds, sore throat, croup, diphtheria, and consumption; for liver, kidneys, biliousness, indigestion, neuralgia; for malaria, bilious and intermittent fevers, measles, scarlet fever, typhoid, and smallpox. (N. J. 3688.)

"Quickstep, Frye's Remedy" was composed of 99.81 per cent of potassium sodium tartrate and a very small amount of pink sugar. It was advertised as purifying the blood, correcting the action of the stomach, liver, bowels, kidneys, and circulation, and limbering and strengthening the muscles. It was claimed more specifically that it would prevent appendicitis, cure dyspepsia, and that it never failed in hopeless chronic cases of rheumatism, rheumatic gout, neuralgia, sciatica, constipation, malaria, headache, biliousness, indigestion, nervous affections, and loss of vigor. (N. J. 3692.)

"Radway's Ready Relief," a remedy to be used either internally or externally, claimed to relieve paralysis, cholera, spinal affections, pneumonia, pleurisy, dysentery, chills and fever, rheumatism, sore throat, headache, and burns. (N. J. 3704.)

"Dr. H. A. Ingham's Vegetable Expectorant Nervine Pain Extractor," contained 86 per cent alcohol, some opium alkaloids, camphor, capsicum, and vegetable extractive matter. It was stated to be a remedy for colds, sore throat, boneache, chills, headache, fever, croup, quinsy, congestion, soreness and pressure of the

lungs, pleurisy, typhoid, lung, scarlet, and rheumatic fevers, palpitation of the heart, pressure of blood to the head, pain in the chest, side, shoulders, joints, limbs, toothache, and crick in the back, cholera, bilious colic, dysentery, common or chronic bowel complaint, sunstroke, and suspended animation; for diphtheria, dyspepsia, bleeding at the lungs, nervous exhaustion, neuralgia, and asthma; for inflammation of the eyes, piles, poison from ivy, chilblains, venomous bites, stings, contracted cords, paralyzed limbs, apoplexy, and epilepsy. Worse still, this mixture of alcohol and opium was labeled: "For teething and restless children, it is not only safe and harmless, but positively beneficial; it agrees with the most tender child or feeble infant." (N. J. 3734.)

"Green Mountain Oil or Magic Pain Destroyer" consisted essentially of 95 per cent of linseed oil and a small amount of oil of sassafras, oil of thuja, and oil of turpentine. It claimed to be a remedy for diphtheria, croup, deafness, and sore eyes; rheumatic pains, stiff joints, pains in the back, side, or breast; dyspepsia, asthma, piles, burns, sore throat, sprains, wounds and bruises, neuralgia, croup, toothache and headache, earache and stiff neck; felons, salt rheum, broken breast, erysipelas, chilblains, frosted feet, and all nervous complaints. (N. J. 3797.)

"Cassidy's 4 X, the Great Blood Purifier," was recommended for blood poisoning, scrofula, salt rheum, king's evil, rheumatism, chronic ulcers, old sores, erysipelas, eczema, ulcers, boils, hereditary blood poisoning, cancers, and syphilis. (N. J. 3966).

"Dr. Porter's Antiseptic Healing Oil" was essentially a solution of camphor and carbolic acid in cottonseed oil. It was claimed to be a remedy for cuts and sores,

ulcers, corns, bunions, frost bites, sunburn, stings, bites, rash, prickly heat, hives, eczema, scrofula, boils, earache, erysipelas, sore throat, catarrh, toothache, granulated eyelids. It was also claimed that it should be used to prevent serious infectious diseases, such as whooping cough, diphtheria, and tuberculosis, and that it would cure tumors and cancerous growths. (N. J. 3969.)